85-737

No.

Supreme Court, U.S.
FILED
OCT 30 1985
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CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1985

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PINNEY DOCK & TRANSPORT COMPANY,
LITTON INDUSTRIES, INC.,
LITTON SYSTEMS, INC.,
LITTON GREAT LAKES CORPORATION
and ERIE MARINE, INC.,
*Petitioners*

v.

THE PENN CENTRAL CORPORATION,
*Respondent*

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## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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## QUESTION PRESENTED

This case arises out of the bankruptcy reorganization of the Penn Central Transportation Company ("Penn Central"). The consummation order in that proceeding purports to discharge all claims against Penn Central and its successor. Petitioners were the victims of an antitrust conspiracy in which Penn Central was a leading participant. Because Penn Central and its co-conspirators fraudulently concealed the conspiracy from petitioners, they learned of their antitrust claims only after entry of the consummation order. The courts below denied petitioners' request for permission to pursue their antitrust claims against Penn Central's successor, even though the courts assumed that petitioners "neither knew nor had reason to know of their antitrust claims because of the alleged conspiracy. . . ." (Pet. App. at 54a.)

The question presented is:

Does the Due Process Clause prohibit the discharge in bankruptcy of fraudulently concealed antitrust conspiracy claims where the claimants "neither knew nor had reason to know of their antitrust claims," and therefore did not receive adequate notice or a reasonable opportunity to be heard with respect to those claims? Stated differently, can the Bankruptcy Act's discharge provision be used to deprive a party of a federally created property right without notice and an opportunity to be heard?

## PARTIES TO THE PROCEEDING

Petitioners are listed fully in the caption. Respondent is The Penn Central Corporation, the successor to the Penn Central Transportation Company.

## STATEMENT REQUIRED BY RULE 28.1

Petitioner Pinney Dock & Transport Company is owned in part by the Standard Slag Corporation. Petitioners Litton Systems, Inc., Litton Great Lakes Corporation, and Erie Marine, Inc. are wholly-owned subsidiaries of petitioner Litton Industries, Inc. In addition to other wholly-owned subsidiaries, Litton Industries, Inc. has a partially-owned affiliate, National Tag Co., an Ohio corporation.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1985

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No.

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PINNEY DOCK & TRANSPORT COMPANY,
LITTON INDUSTRIES, INC.,
LITTON SYSTEMS, INC.,
LITTON GREAT LAKES CORPORATION
and ERIE MARINE, INC.,
*Petitioners*

v.

THE PENN CENTRAL CORPORATION,
*Respondent*

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## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

---

Petitioners, Pinney Dock & Transport Company ("Pinney"), Litton Industries, Inc., Litton Systems Inc., Litton Great Lakes Corporation and Erie Marine Inc. ("Litton"), respectfully pray for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this action.

## OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-22a) is reported at 771 F.2d 762. The opinion of the reorganization court (Pet. App. 23a-58a) is reported at 42 B.R. 657. The reorganization court's separate order implementing its decision is unreported. (Pet. App. 59a-61a.)

## JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The judgment of the court of appeals was entered on August 29, 1985. This petition is filed within 90 days of that date.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Due Process Clause of the Constitution of the United States, U.S. Const. amend. V, provides:

> No person . . . shall be deprived of . . . property, without due process of law . . . .

Section 4 of the Clayton Act, 15 U.S.C. § 15(a) (1982 & Supp. 1985), provides:

> [A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor . . . and shall recover threefold the damages by him sustained. . . .

Section 77(f) of the Bankruptcy Act of 1898, 11 U.S.C. § 205(f) (1976) (repealed 1978), provides:

> Upon confirmation by the judge, the provisions of the plan and of the order of confirmation shall . . . be binding upon the debtor, all stockholders thereof, including those who have not, as well as those who have, accepted it, and all creditors secured or unsecured, whether or not adversely affected by the plan, and whether or not their claims shall have been filed, and, if filed whether or not approved, including creditors who have not, as well as those who have, accepted it. . . . The property dealt with by the plan, when transferred and conveyed . . . to the other corporation . . . provided for by the plan . . . shall be free and clear of all claims of the debtor, its stockholders and creditors, and the debtor shall be discharged from its debts and liabilities, except such as may consistently with the provisions of the plan be reserved in the order confirming the plan or directing such transfer and conveyance or retention . . . .

## STATEMENT OF THE CASE

Petitioners Pinney and Litton are plaintiffs in separate antitrust actions brought against The Penn Central Corporation and four railroads in the Northern District of Ohio. Petitioners initiated an action in the reorganization court to obtain relief from the Penn Central consummation order so that they could pursue their antitrust cases against Penn Central. The consummation order was entered pursuant to Section 77(f) of the Bankruptcy Act, 11 U.S.C. § 205(f) (1976) (repealed 1978), and purports to discharge all claims against Penn Central and its successor.

Petitioners were the victims of a long-standing conspiracy to monopolize and restrain competition in the provision of dock services for, and the transportation of, iron ore and other commodities moving over the Great Lakes to inland destinations. Penn Central and its co-conspirators fraudulently concealed the conspiracy from petitioners so that they were not aware of their antitrust causes of action until the conspiracy was discovered nearly two years after the consumation order was issued.

Petitioners sought leave from the reorganization court to pursue their antitrust actions against Penn Central on the grounds that under the Due Process Clause, the consummation order could not bar petitioners' unknown and fraudulently concealed antitrust claims.

While petitioners' motion was pending before the reorganization court, the Ohio court denied summary judgment for Penn Central's co-conspirators on the fraudulent concealment issue. *Pinney Dock & Transport Co. v. Penn Central Corp.*, 1983-2 Trade Cas. (CCH) ¶ 65,608 (N.D. Ohio 1983).[1] The court considered evidence that

[1] The court's ruling was issued in *Pinney*. On October 4, 1984, the court similarly ruled in *Litton* that genuine issues of material fact exist as to defendants' fraudulent concealment of the conspiracy. *Litton Industries, Inc. v. Penn Central Corp.*, No. C81-372

"the conspiracy was formulated and carried out under a cloak of secrecy" and that defendants deliberately concealed and disguised their activities to preclude detection. (1983-2 Trade Cas. at 69,041.) The court found evidence that defendants, particularly Penn Central, had taken affirmative steps to conceal their conduct. (*Id.* at 69,044.) The evidence relied upon by the court included acts taken by Penn Central officers during the reorganization. The court concluded, for example, that:

> These letters and statements of Penn Central *in the 1970's* would permit the trier of fact to find that Penn Central affirmatively misled Pinney . . .

(*Id.* at 69,046; emphasis added.)

The reorganization court denied Pinney's and Litton's petition for leave to pursue their antitrust claims against Penn Central. (Pet. App. 23a.) Although the court acknowledged that "the petitioners did not have explicit evidence of the conspiracy until 1979" (Pet. App. at 26a), and assumed that neither Pinney nor Litton "knew nor had reason to know of their antitrust claims because of the alleged conspiracy" (*id.* at 54a), it found that the standard notice sent to petitioners and thousands of others, based upon their ordinary commercial dealings with the debtor, satisfied petitioners' due process rights.

The court of appeals affirmed. (Pet. App. 1a.) Adopting the approach of the reorganization court, the court of appeals limited to its facts this Court's ruling in *City of New York v. New York, New Haven & Hartford Railroad*, 344 U.S. 293 (1953). In concluding that the standard form notice was constitutionally adequate in the circumstances of this case, neither the reorganization court nor the court of appeals analyzed the ability of the notice to inform petitioners that their antitrust claims would be extinguished in the reorganization. The court

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(N.D. Ohio Oct. 4, 1984). Both rulings are now on interlocutory appeal in the Sixth Circuit. (Docket Nos. 84-3653 and 84-3877.)

of appeals accepted the reorganization court's conclusion that petitioners did not know of their claims during the reorganization and recognized that petitioners "received mail notice . . . because of their *other* claims," (Pet. App. at 14a), and "chose whether or not to participate in the reorganization proceedings as to their *other* claims." (Pet. App. at 17a; emphasis added.) Without regard to these factors, the court of appeals held that notice of a hearing alone satisfies due process.

## REASONS FOR GRANTING THE WRIT

The Court should grant a writ of certiorari because: (a) this case presents an important question of constitutional law concerning the due process rights of one who, because of a debtor's wrongful concealment, neither knew nor had reason to know, that its federally created antitrust claims were being discharged under Section 77(f) of the Bankruptcy Act; and (b) the decision of the court of appeals so conflicts with the principles of due process as to constitute an extreme departure from the accepted and usual course of judicial proceedings where due process rights are held to transcend conflicting statutory provisions.

The court of appeals decision elevates the Bankruptcy Act's policy of finality above the requirements of the Constitution. As a result, petitioners' federally created property interests have been extinguished without due process of law. This Court should grant certiorari to vindicate petitioners' constitutional rights and to extinguish a dangerous precedent that allows debtors to use the bankruptcy laws to discharge claims they have fraudulently concealed.

## I. THE COURT OF APPEALS FAILED TO RECOGNIZE THAT THE BANKRUPTCY ACT MUST YIELD TO THE REQUIREMENTS OF THE DUE PROCESS CLAUSE

In upholding the discharge of petitioners' antitrust claims, the court of appeals subordinated the Constitution to statutory concerns of finality embodied in the Bankruptcy Act. Although Section 77(f) of the Bankruptcy Act and the Penn Central consummation order purport to discharge all claims against the debtor without qualification, the statutory power to discharge claims is plainly constrained by the Constitution. *City of New York v. New York, New Haven & Hartford Railroad*, 344 U.S. 293 (1953). "The bankruptcy power, like the other great substantive powers of Congress, is subject to the Fifth Amendment." *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555, 589 (1935).

Petitioners' antitrust causes of action were federally created property interests entitled to the protection of the Due Process Clause. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428 (1982); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950). Where a constitutionally protected property interest is involved, due process requires that the claimholder must be afforded adequate notice and a reasonable opportunity to be heard before its claim can be discharged.

In *City of New York v. New York, New Haven & Hartford Railroad*, 344 U.S. 293 (1953), this Court held that if due process is not accorded to a holder of a constitutionally protected claim, the claim cannot be barred by a section 77(f) discharge. In that case, the debtor sought to enforce a section 77(f) consummation order and obtain a declaration that the City of New York's lien claims were barred. The city contended that notice by publication was inadequate and that it was entitled to mail notice. This Court agreed and held that the city's lien claims were not barred because notice to the city

was not reasonable and thus failed to comply with due process.

Relying on *City of New York*, numerous lower courts have ruled that a discharge in bankruptcy does not bar claimants that were not afforded due process. *See, e.g., Reliable Electric Co. v. Olson Construction Co.*, 726 F.2d 620, 623 (10th Cir. 1984); *In re Intaco Puerto Rico, Inc.*, 494 F.2d 94, 98-99 (1st Cir. 1974); and *In re Harbor Tank Storage Co.*, 385 F.2d 111, 114 (3d Cir. 1967).

The court of appeals decided that "Pinney and Litton received all the notice that they were due under the Constitution" (Pet. App. at 17a) by disregarding the clear rationale of *City of New York* and its progeny. These cases recognize that in the exercise of the bankruptcy power a court is obligated to respect due process rights and provide full legal process. That mail notice of the proof of claim program and bar date was sufficient under the facts of *New York* does not mean that the same notice is adequate in all situations. The standard notice procedure used in the Penn Central reorganization assumed that all recipients had knowledge of their claims, or, at the very least, had ready access to facts from which they could determine that a claim existed. This assumption is not applicable on the facts of this case because petitioners' claims were concealed from them by Penn Central.

Although the court of appeals accepted the reorganization court's conclusion that petitioners did not know of their claims during the reorganization (Pet. App. at 20a), and recognized that petitioners "received mail notice . . . because of their *other* claims" (Pet. App. at 14a), it nevertheless relied on a standard form notice that could not have apprised petitioners of their interest in the reorganization. The reason for the court's indifference towards petitioners' due process rights can be seen in its conclusion that "effect must be given to the policy of finality in section 77 reorganizations. . . ." (Pet. App. at

17a.) In so doing, the court treated the Bankruptcy Act as occupying a status shielded from constitutional requirements. Congress did not intend that the property rights it granted under the antitrust laws would be subordinated to Section 77(f) of the Bankruptcy Act and that such rights could be extinguished without regard to constitutional requirements of due process.

## II. THE COURT OF APPEALS INCORRECTLY HELD THAT THE GENERAL FORM NOTICE SENT TO CREDITORS OF A BANKRUPT SATISFIES DUE PROCESS EVEN WHERE IT DOES NOT PROVIDE NOTICE OR AN OPPORTUNITY TO BE HEARD

The court of appeals incorrectly held, without regard for the particular circumstances of this case, that due process was satisfied by the form notice sent to creditors advising them of the date by which claims must be filed. This notice was constitutionally inadequate because petitioners neither knew nor had reason to know of the existence of their claims because of the debtor's fraudulent concealment.[2] Before the reorganization court could discharge their claims, petitioners were entitled to notice

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[2] In petitioners' antitrust cases, the court denied defendants' motions for summary judgment on finding that genuine issues of material fact exist as to Penn Central's fraudulent concealment. *Pinney Dock & Transport Co. v. Penn Central Corp.*, 1983-2 Trade Cas. (CCH) ¶ 65,608 (N.D. Ohio 1983); *Litton Indus. Inc. v. Penn Central Corp.*, No. C81-372 (N.D. Ohio Oct. 4, 1984). While the reorganization court considered evidence of fraudulent concealment, it found only that the trustees had not engaged in improper conduct. (Pet. App. at 35a and 53a.) In deciding petitioners' alternative claim for eqiutable relief, the court ruled that petitioners had not satisfied the clear and convincing standard of evidence required to warrant equitable relief on the basis of fraud. This ruling has no bearing on petitioners' due process claims since all that needs to be shown to establish a denial of due process is petitioners' lack of knowledge due to the debtors' wrongful concealment. Petitioners need not establish "fraud" or proffer "clear and convincing" evidence.

sufficient to enable them to protect their interests in the reorganization proceeding.

The court of appeals relied on petitioners' receipt of "mail notice of the proof of claim program and the bar date" as constitutionally adequate notice.[3] (Pet. App. at 17a.) In so doing, the court of appeals held that due process is satisfied by notice of a hearing alone, without regard for the ability of such notice to inform the recipient of the interests at stake at the hearing. (Pet. App. at 14a-17a.) This decision departs from due process requirements established by this Court and sets a precedent that sanctions the use of constitutionally inadequate notice in bankruptcy proceedings.

In *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314-15 (1950), this Court recognized: "An elementary and fundamental requirement of due process . . . is notice reasonably calculated under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." Construing *Mullane*, the Court in *Greene v. Lindsey*, 456 U.S. 444, 451 (1982), explained that "the sufficiency of the notice must be tested with reference to its ability to inform people of the pendency of proceedings that affect their interests." This Court has held that a class action member, a utility customer and a landowner are entitled to more than mere notice of a hearing. *See Phillips Petroleum Co. v. Shutts*, —— U.S. ——, 105 S. Ct. 2965 (1985); *Memphis Light Gas & Water Division v. Craft*, 436 U.S. 1 (1978); and *Covey v. Town of Somers*, 351 U.S. 141 (1956). Likewise, a claimant in a bankruptcy proceeding is entitled

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[3] Petitioners received this notice in their capacity as potential commercial creditors of Penn Central. In the context of this case, their receipt of this notice was fortuitous and had nothing to do with petitioners' antitrust claims. The court of appeals recognized that "Pinney and Litton . . . received mail notice . . . *because of their other claims.*" (Pet. App. at 14a; emphasis added.)

to more than standard form notice of a hearing where its claims have been fraudulently concealed by the debtor so as to render the form notice meaningless.

The court of appeals justified its conclusion that Pinney and Litton received all the notice they were due under the Constitution because the "trustees did not know any facts about the alleged conspiracy" (Pet. App. at 17a), and, therefore, could not have provided better notice. Like petitioners, however, the trustees were victims of Penn Central's misconduct and their lack of knowledge must be attributed to Penn Central's concealment. That the trustees may have been incapable of providing better notice does not diminish the fact that petitioners were entitled to constitutionally adequate notice, and a discharge of peitioners' claims without such notice violates due process. The court of appeals plainly erred when it ruled that due process was accorded to petitioners because the trustees gave the best notice possible when it was Penn Central's conduct that prevented the trustees from giving the kind of notice required. Because the failure to provide constitutionally adequate notice was due to Penn Central's wrongdoing, Penn Central should not be entitled to a discharge of petitioners' claims.

This Court has held that "when notice is a person's due, process which is a mere gesture is not due process." *Mullane*, 339 U.S. at 315. "This right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest." (*Id.* at 314.) By refusing to examine the ability of the notice to inform petitioners of the interests affected by the reorganization, the court of appeals sanctioned the use of notice as a mere gesture.

The implications of the court of appeals' decision are profound. In any reorganization, a debtor could conceal

claims in order to gain a more favorable discharge. Such a result is antithetical to the principle of fundamental fairness underlying the Due Process Clause and to the principle that the bankruptcy laws are designed to protect the "honest" debtor. *See Continental Illinois National Bank & Trust Co. v. Chicago, Rock Island & Pacific Railway*, 294 U.S. 648, 670-71 (1935).

## CONCLUSION

For the reasons stated herein, Pinney and Litton respectfully request this Court to issue a writ of certiorari to review the decision of the Court of Appeals for the Third Circuit.

Respectfully submitted,

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October 30, 1985

# APPENDICES

**APPENDIX A**

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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Nos. 84-1355 and 84-1391

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IN RE: PENN CENTRAL TRANSPORTATION COMPANY

PINNEY DOCK & TRANSPORT COMPANY,
LITTON INDUSTRIES, INC.,
LITTON SYSTEMS, INC.,
LITTON GREAT LAKES CORPORATION
and ERIE MARINE INC.,
*Appellants*

---

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(Bankruptcy No. 70-347)

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Argued: March 20, 1985

Before: SEITZ, HIGGINBOTHAM, *Circuit Judges*
WEBER, *District Judge* *

(Filed: August 29, 1985)

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## OPINION OF THE COURT

A. LEON HIGGINBOTHAM, JR., *Circuit Judge.*

In this consolidated appeal, Pinney Dock & Transport Company ("Pinney"), Litton Industries, Inc., Litton Systems, Inc., Litton Great Lakes Corporation, and Erie Marine, Inc. ("Litton") appeal from final bankruptcy orders of the United States District Court for the Eastern District of Pennsylvania. The court denied their petition for leave to pursue antitrust actions in another forum against Penn Central Corporation ("PCC"), the reorganized company formed in the railroad reorganization proceedings of Penn Central Transportation Company ("PCTC") and several secondary debtors pursuant to section 77 of the Bankruptcy Act, formerly codified at 11 U.S.C. § 205 (repealed 1978). Pinney and Litton allege that, although they received notice of the reorganization proceedings, their claims for damages based on an antitrust conspiracy were fraudulently concealed from them and that they should therefore be allowed to prosecute those claims now. We will affirm the district court for the reasons expressed in this opinion.

### I.

### A.

On June 21, 1970, PCTC filed a petition for railroad reorganization under section 77.[1] Section 77(c)(7) provides in pertinent part that the court shall "fix a reasonable time within which the claims of creditors may

[1] The district court's opinion, Matter of Penn Central Transp. Co., 458 F. Supp. 1234 (E.D. Pa. 1978), provides an extensive history of the reorganization procedings. *See also* Matter of Penn Central Transp. Co., 596 F.2d 1127, 1130-35 (3d Cir. 1979).

be filed or evidenced and after which no claim not so filed or evidenced may participate" in the Plan of Reorganization ("Plan")[2] except on order for cause shown. Accordingly, on February 18, 1971, the district court entered Order No. 164, requiring all proofs of claims against PCTC arising prior to the date of the reorganization petition, except those specifically exempted, to be filed with the court by June 1, 1971. Appendix at 1-32. In Order No. 914, entered September 12, 1972, the court also established a procedure for creditors who had been notified of the proof of claim requirement, and who had failed to comply with the above bar date, to attempt to show good cause why their claims should not be excluded from participation in the Plan. Appendix at 33-34. Pinney, Litton, and Pinney's parent corporation, Standard Slag Co., received notice by mail of Order Nos. 164 and 914. Appendix at 580-82. Litton and Standard Slag Co. also filed proofs of claims which were not based upon alleged antitrust violations. Pinney did not participate in the proof of claim procedure.

On March 17, 1978, the district court approved the Plan as amended in its opinion. *Matter of Penn Central Transp. Co.*, 458 F. Supp. 1234, 1346 (E.D. Pa. 1978). Overwhelming majorities of all except three creditor

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[2] Section 77(b) provides *inter alia*:

> A plan of reorganization within the meaning of this section . . . shall include provisions modifying or altering the rights of creditors generally, or of any class of them, secured or unsecured . . . .
>
> * * * *
>
> The term "creditors" shall include, for all purposes of this section all holders of claims of whatever character against the debtor or its property, whether or not such claims would otherwise constitute provable claims under this Act . . . .
>
> The term "claims" includes debts, whether liquidated or unliquidated, securities . . . , liens, or other interests of whatever character.

11 U.S.C. § 205(b) (repealed 1978).

classes then voted to accept the Plan. Litton and Standard Slag Co. were among the creditors who accepted the Plan. On August 17, 1978, the district court entered the Confirmation Order No. 3707 and the Consummation Order No. 3708, setting October 24, 1978, as the consummation date. *Matter of Penn Central Trans. Co.*, 458 F. Supp. 1364 (E.D. Pa. 1978).[3]

B.

The Consummation Order constituted the final decree in the reorganization process and, pursuant to section 77(f), contains the following relevant sections:

> 3.06. *Discharge of Release of Claims.* Subject to the provisions of Section 6.03 below relating to the payment, assumption or satisfaction by the Reorganized Company of certain claims, the Debtors and the Trustees of the properties of the Debtors shall, as of the Consumation Date, be discharged and released forever from
>
> > (a) all obligations, debts, liabilities and claims against any of the Debtors, whether or not filed or presented, whether or not approved, acknowledged or allowed in these proceedings and whether or not provable in bankruptcy. . . .
>
> 6.03. *Assumed Obligations.* The claims of creditors, claimants and stockholders in respect of obligations of any of the Debtors or Trustees of the

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[3] This court affirmed the approval and confirmation of the Plan in three separate opinions. *See* 596 F.2d 1102 (3d Cir. 1979) (affirming in part and remanding for modification of the distribution to two indenture trustees), 596 F.2d 1127 (3d Cir.), *cert. denied*, 444 U.S. 834 (1979) (affirming and rejecting the objections of certain secured creditors), and 596 F.2d 1155 (3d Cir.), *cert. denied*, 444 U.S. 835 (1979) (dismissing the appeal of certain shareholders and affirming two orders in the related Chapter XI proceedings).

properties of the Debtors will be satisfied as provided in the Plans, subject, however, to the provisions of this Order relating to the payment or satisfaction of such claims. Any timely-filed claim . . . against any of the Debtors or Trustees and contingent claims in respect of guarantees by any of the Debtors of bonds of non-subsidiary companies, against any of the Debtors or their Trustees included in a class provided for in the Plans but not liquidated in amount, settled, determined, classified, approved, acknowledged, allowed or adjudicated to be valid until after the Consummation Date will be satisfied pursuant to the Plans in the same manner as if such claim had been so adjudicated or otherwise liquidated prior to the Consummation Date. Without limiting the generality of the foregoing, the following claims and obligations [not pertinent here] shall be assumed and satisfied by the Reorganized Company . . . .

7.02. *Injunction.* All persons, firms, governmental entities and corporations, wherever situated, located or domiciled, are hereby permanently restrained and enjoined from instituting, prosecuting or pursuing, or attempting to institute, prosecute or pursue, any suits or proceedings, at law or in equity or otherwise, against the Reorganized Company . . . or against the assets or property of the Reorganized Company . . . directly or indirectly, on account of or based upon any right, claim or interest of any kind or nature whatsoever which any such person, firm, governmental entity or corporation may have in, to or against any of the Debtors, the Trustees of the Properties of the Debtors or any of their assets or properties . . . and from interfering with or taking steps to interfere with the Reorganized Company . . . or the operation of the properties or the conduct of the business of the Reorganized Company . . . by

reason of or on account of any obligation or obligations incurred by any of the Debtors or any of their Trustees in these proceedings, except the obligations imposed on the Reorganized Company . . . by the Plans and this Order or reserved for resolution or adjudication by this Order. All persons, firms, governmental entities and corporations, wherever situated, located or domiciled, are hereby restrained and enjoined from instituting, prosecuting or pursuing or attempting to institute, prosecute or pursue any suit or proceedings, at law or in equity or otherwise, against any of the Debtors or any of their assets or property, directly or indirectly, except such suits or proceedings as may be for the purpose of carrying out this Order by consummating the Plans. . . .

7.04. *Reservation of Jurisdiction.* From and after the Consummation Date, the Court hereby reserves jurisdiction, which shall be exclusive to the extent that under applicable law such jurisdiction is presently exclusive:

* * * *

(h) To consider and take appropriate action with respect to the matters referred to in Section 7.02 above, including action to enforce the injunctive provisions of that Section;

7.06. *Termination of Proceedings and Final Decree.* Except as provided in Section 7.04 above . . . all jurisdiction of this Court in or by reason of these proceedings shall be terminated and these proceedings shall be closed effective as of the Consummation Date.

*See* Appendix at 81-102. Section 77(f) provides that:

Upon confirmation by the judge, the provisions of the plan and of the order of confirmation shall . . . be binding upon the debtor, all stockholders thereof,

> including those who have not, as well as those who have, accepted it, and all creditors secured or unsecured, whether or not adversely affected by the plan, and whether or not their claims shall have been filed, and, if filed whether or not approved, including creditors who have not, as well as those who have, accepted it . . . . The property dealt with by the plan, when transferred and conveyed . . . to the other corporation . . . provided for by the plan, [here PCC], . . . shall be free and clear of all claims of the debtor, its stockholders and creditors, and the debtor shall be discharged from its debts and liabilities, except such as may consistently with the provisions of the plan be reserved in the order confirming the plan or directing such transfer and conveyance or retention . . . .

11 U.S.C. § 205(f).

Notwithstanding the discharge and injunctive provisions of Section 77(f) and the Consummation Order, Pinney and Litton filed actions in the United States District Court for the Northern District of Ohio on September 17, 1980, and March 5, 1981, respectively, alleging violations of antitrust laws by PCC, its predecessor railroad companies, and five other railroads ("Cleveland actions").[4] In its complaint, Pinney alleged that the defendants effectively prevented it from handling iron ore at the Pinney dock in Ashtabula, Ohio, because from the middle 1950's throughout the 1970's, they were members of a conspiracy to deny it a competitive rail line haul rate. Litton alleged in its complaint that, by 1973, it had been driven out of the business of building self-unloading vessels because from the middle 1960's the members of the conspiracy would not handle Litton's ships at their

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[4] PCC's co-defendants are Baltimore & Ohio R.R. Co. ("B&O"), Bessemer & Lake Erie R.R. Co. ("B&LE"), CSX Corp. and Chessie Systems, Inc. ("Chessie"), Chesapeake & Ohio Ry. Co. ("C&O"), and Norfolk & Western Ry. Co. ("N&W").

docks, had unreasonably high unloading charges, and/or would not enter a leasing or purchasing agreement to allow Litton to use dock facilities which could accomodate Litton ships. All the defendants in the Cleveland actions moved to dismiss on several grounds.[5] Following extensive discovery, the district court ruled upon summary judgment motions. Under FED. R. CIV. P. 42(b), the court considered separately PCC's contention that Pinney and Litton were enjoined from pursuing an action against PCC by section 7.02 of the Consummation Order. The court granted PCC partial summary judgment as to alleged anticompetitive acts occurring after the October 24, 1978 consummation date. As to those allegations based upon the actions of PCTC or its predecessors, however, the court found that under sections 7.02 and 7.04(h) of the order, Pinney and Litton would have to obtain the permission of the reorganization court prior to any further prosecution of their antitrust claims against PCC. *See Pinney Dock & Transport Co. v. Penn Central Corp., et al.*, 1982-83 Trade Cas. (CCH) ¶ 65,054 (N.D. Ohio 1982).

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[5] The defendants contended in their motions that the actions should be dismissed because of: 1) the injunctive provisions of the Consummation Order (PCC only); 2) the lack of standing or a direct or cognizable injury (B&LE only); 3) the four-year statute of limitations in section 4B of the Clayton Act, 15 U.S.C. § 15(b) (1976); 4) the doctrine established in Keogh v. Chicago & Northwestern Ry., 260 U.S. 156 (1922); 5) the relief requested having been rendered moot as well as barred by laches; 6) the immunity of section 5A of the Interstate Commerce Act, 49 U.S.C. § 5(b) (1976), from prosecution under antitrust laws; and 7) the primary jurisdiction of the Interstate Commerce Comm. In two opinions filed June 21, 1983, the Cleveland court denied the motions of the PCC's co-defendants. *See*, Pinney Dock & Transport Co., et al. v. Penn Central Transp. Co., et al., 1982-83 Trade Cas. (CCH) ¶ 65,607 (N.D. Ohio (1983), *aff'd on reconsideration*, 600 F. Supp. 859 (N.D. Ohio 1984), and Pinney Dock & Transport Co., et al. v. Penn Central Transp., et al., 1982-83 Trade Cas. (CCH) ¶ 65,608 (N.D. Ohio 1983).

Pinney and Litton therefore filed a petition for leave to pursue the Cleveland actions on January 25, 1983, with the district court below. The court conducted two hearings, held April 12 and November 9, 1983. After the first hearing, the court entered Memorandum and Order No. 4206 on September 20, 1983, finding that Pinney and Litton could not ignore the provisions of section 77(f), therefore PCC could be liable for PCTC's debts only as provided for in the Plan. Appendix at 627-37. The court also granted their request for a second evidentiary hearing on their allegation of fraudulent concealment. Appendix at 635. The court denied their petition on May 22, 1984, *Matter of Penn Central Transp. Co.*, 42 B.R. 657 (E.D. Pa. 1984), and on June 22, 1984, permanently enjoined them from prosecuting the Cleveland actions as well as from prosecuting any other action for damages or other relief based upon bankruptcy claims which arose prior to the 1978 Consummation Order. Appendix at 1547-49. On August 13, 1984, this court consolidated the notices of appeal, filed June 20 and 28, 1984, which followed the orders below.

## II.

An antitrust conspiracy, such as the one alleged by Pinney and Litton in the Cleveland actions, accrues when a defendant commits an act in furtherance of the conspiracy that injures the plaintiff and results in ascertainable damages. *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 338 (1971), *reh'g denied*, 401 U.S. 1015 (1971). Moreover, such actions constitute bankruptcy "claims" within the meaning of section 77 since they are based upon federal statutes that create substantive obligations wholly separate from bankruptcy law. *See Vanston Bondholders Protective Committee v. Green*, 329 U.S. 156, 170 (1946) (Frankfurter, J., concurring). The court below determined, and Pinney and Litton do not dispute, that their "claims" against PCTC

due to the alleged antitrust conspiracy existed prior to and during the reorganization proceedings. We therefore must begin with the assumption that their claims have been discharged by section 77(f) and the provisions of the Consummation Order. *See Duryee v. Erie R.R. Co.*, 175 F.2d 58, (6th Cir.), *cert. denied*, 338 U.S. 861 (1949).

The *Duryee* case also involved a creditor who attempted to assert a claim against a railroad which had completed its reorganization pursuant to section 77. In holding that the creditor's claim was discharged, the court spoke about the importance of finality in section 77 proceedings:

> Since Section 77, sub. f. of the Bankruptcy Act provides that the property dealt with by the plan, when conveyed by the debtor . . . pursuant to the plan, shall be free and clear of claims of the debtor, its stockholders and creditors, and the debtor shall be discharged from its debts and liabilities "except such as may consistently with the provisions of the plan be reserved in the order confirming the plan or directing such transfer and conveyance or retention," it is clear that any reservation of jurisdiction by the reorganization court is limited to claims provided for in the reorganization plan. It unquestionably follows that the "bar" order could not be construed to permit the assertion, at the present time, of a claim existing prior to the reorganization proceedings.
>
> * * * *
>
> We are in complete agreement with the observations made by the district court in its opinion dismissing appellant's action to the effect that the purpose of the bankruptcy law and the provisions for reorganization could not be realized if the discharge of debtors were not complete and absolute; that if courts should relax the provisions of the law and

> facilitate the assertion of old claims against discharged and reorganized debtors, the policy of the law would be defeated; that creditors would not participate in reorganizations if they could not feel that the plan was final; and that it would be unjust and unfair to those who had accepted and acted upon a reorganization plan if the court were thereafter to reopen the plan and change the conditions which constituted the basis of its earlier acceptance.

175 F.2d at 61, 63.

Thus, we note that the facts here and in *Duryee* are different from those in this court's recent decision in *Schweitzer et al. v. Consolidated Rail Corp. et al.*, 758 F.2d 936 (3d Cir. 1985), *petition for cert. filed*, 54 U.S.L.W. 3044 (U.S. June 26, 1985) (No. 84-2008). In *Schweitzer*, this court reversed the decisions of the district courts and held that, since a cause of action under the Federal Employer's Liability Act, 45 U.S.C. §§ 57-60 (1948), does not accrue until an injury has manifested, the lawsuits of former railroad employees seeking damages for injuries due to asbestos-related diseases which did not become manifest until *after* the consummation of reorganization, do not constitute "claims" which are dischargable under section 77. 758 F.2d at 941, 944.[6]

On appeal, Pinney and Litton argue that their claims were unknown and undisclosed to them during the reorganization proceeding due to PCTC's fraudulent concealment of the conspiracy. They seek an exemption from the Consummation Order because they contend that

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[6] Since we held that the appellants in the Schweitzer case did not have dischargable "claims", we did not reach such questions as whether the appellants' due process rights would be violated by the discharge provisions of subsection (f) and the consummation orders, or whether this court could grant equitable exemptions from those provisions.

they did not receive constitutionally adequate notice in the reorganization proceedings,[7] and because they believe they have established sufficient grounds for equitable relief from the order under FED. R. CIV. P. 60(b)(3) and (6). We will discuss the two arguments separately.

A.

In *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314-15 (1950) the Supreme Court stated that:

> An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. The notice must be of such nature as reasonably to convey the required information . . . and it must afford a reasonable time for those interested to make their appearance. . . . But if with due regard for the practicalities and peculiarities of the case these conditions are reasonably met, the constitutional requirements are satisfied.

(citations omitted). Thus the purpose of the notice requirement is to advise individuals who will be affected by the outcome of any proceeding of the impending *hearing* so that they can take steps to safeguard their inter-

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[7] Pinney and Litton also argued below that they did not receive adequate notice under section 77(c) and Rule 8-208 of the Rules of Bankruptcy Procedure (1976). As the district court noted, however, they concede the PCTC trustees "had no knowledge of any facts which suggested that the petitioners had antitrust claims", and the court found as a matter of law and fact that the trustees completely satisfied their fiduciary duties under section 77. 42 B.R. at 664-66. Pinney and Litton do not contend that the court's factual findings are clearly erroneous. On appeal, they also have apparently abandoned their argument that the trustees did not do all that was required under Section 77 with regard to notice to creditors.

ests. *Memphis Light Gas & Water Division v. Craft*, 436 U.S. 1, 14 (1978). *Greene* v. *Lindsey*, 456 U.S. 444, 451 (1982). The notice requirement is not necessarily intended to advise them of the nature of those interests.

As the court below noted, the PCTC trustees "completed an exhaustive search of their accounting records in an effort to send notice of the proof of claim program to anyone who might have had a claim." 42 B.R. at 665, fn. 4. Moreover, despite their opportunity to gain information through extensive discovery, Pinney and Litton admit that the trustees had no knowledge of facts which would suggest that the instant alleged antitrust claims existed. 42 B.R. at 664-65. Pinney and Litton nevertheless received mail notice of Order No. 164, the standard proof of claim forms and schedules, and subsequent orders regarding the proof of claim program because of their other claims.

All non-exempt creditors were required by the terms of the above orders to file their claims by the bar date of June 1, 1971, or show cause why their claims should not be excluded from participation under the Plan. Appendix at 4-5, 34-36. If a claim did not fall into one of the enumerated schedule categories, the claimant was still required to provide a general description of the claim. Appendix at 7-13. Pinney and Litton have never filed such a general description of their antitrust claims.

Pinney and Litton argue that the above notice procedure was based upon the assumption that they would have knowledge of their unknown claims or would have access to facts from which they could discover those claims. They further argue that, while this assumption may be constitutionally proper and adequate for ordinary commercial claims, it was completely inadequate for their antitrust claims because they were not effectively advised of the effect that reorganization would have on them. Despite the fact that nothing in section 77

requires trustees to provide information to creditors as to the character of their claims, they rely on the reasoning in *City of New York v. New York, New Haven & Hartford R.R. Co.*, 344 U.S. 293 (1953), *In re Harbor Tank Storage Co., Inc.*, 385 F.2d 111 (3d Cir. 1967), and *Reliable Electric Co., Inc. v. Olson Construction Co.*, 726 F.2d 620 (10th Cir. 1984). These cases are inapposite. They do not support the contention that due process required that the PCTC trustees should have notified Pinney and Litton that they had bankruptcy claims based specifically upon an antitrust conspiracy and, since the trustees did not provide them with such specific notice, their claims are not barred.

*City of New York*, involved a reorganization under section 77. The district court issued an order requiring the filing of claims before the bar date and that the trustees send mail notice of the order only to certain creditors. The city knew about the reorganization proceedings, but received only constructive notice of the order by publication, and did not file its claims for local improvement liens on the railroad's property before the bar date. The Supreme Court held that the city did not receive reasonable notice under section 77(c)(8) since the railroad and the trustees knew about the city's liens and failed to provide it with mail notice of the court's order. 344 U.S. at 296-97.

In the *Harbor Tank* case, Murray Oil Products Co. appealed the decision of the district court denying its petition to file a claim against Harbor Tank after its plan of reorganization had been confirmed in proceedings pursuant to Chapter X of the Bankruptcy Act, 11 U.S.C. §§ 501-676 (1964). Although Murray Oil knew about the reorganization proceedings and the trustee for Harbor Tank knew about its claim, the trustee did not provide mail notice of the proof of claim bar date, the summary of the reorganization plan, or of the hearings to

consider objections and amendments to the plan. 385 F.2d at 112. This court held that "[t]he rejection of Murray Oil's petition in the face of the inexplicable failure of the trustee to give Murray Oil any of the various notices required by Chapter X—despite the trustee's actual knowledge of Murray Oil's unsatisfied, meritorious claim—constitutes a denial of due process." 385 F.2d at 114. The notice that the creditor was required to receive was of the court's hearings and other actions in the reorganization proceedings.

> The reorganization process is dependent on the proper notification to creditors and other interested parties *of all important steps in the proceeding so that they may take such steps as necessary to safeguard their interests.* Although notice by publication may be deemed to satisfy the requirements of the Act in some situations, certainly such notice is insufficient where, as here, the trustee knows both the existence and address of a creditor. And the fact that a creditor knows of the initiation of reorganization proceedings does not of itself place a burden on the creditor to file an appearance or claim in the proceeding before receiving notice to do so: a creditor has every right to assume that he will be sent all the notices to which he is entitled under the Act.

*Id.* at 115 (emphasis added).

*Reliable Electric* also involved a known creditor who was aware of the bankruptcy reorganization but, due to the trustee's actions, never received notice of any of the proceedings. 726 F.2d at 621. In this case the tenth circuit held that:

> the discharge of a claim *without reasonable notice of the confirmation hearings* is violative of the fifth amendment of the United States Constitution. In our view, this holding is supported by the Supreme

> Court's decisions in *Mullane*, *supra*, and *New York*, *supra*.

*Id.* at 623 (emphasis added). The court stated that "the reorganization process depends upon all creditors and interested parties being properly notified of all vital steps in the proceeding so they may have the opportunity to protect their interests." *Id.*

Unlike the facts in the above cases, Pinney and Litton 1) received mail notice of the proof of claim program and the bar date, 2) chose whether or not to participate in the reorganization proceedings as to their other claims, and 3) sought relief from the district court long after the consummation of reorganization. They further admit that the trustees did not know any facts about the alleged conspiracy. Under these circumstances, we agree with the district court that effect must be given to the policy of finality in section 77 reorganizations and we find that Pinney and Litton received all the notice that they were due under the Constitution.

B.

Pinney and Litton contend that the district court abused its discretion in failing to grant their request for equitable relief from the Consummation Order under FED. R. CIV. P. 60(b)(3) and (6). As applied to Section 77 by Rule 8-703(a)(5) of the Rules of Bankruptcy Procedure (1976), Rule 60(b) provides that:

> On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: . . . (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; . . . or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1),

> (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken, except that a motion to reopen a case or for reconsideration of an order allowing or disallowing a claim against the debtor entered without a contest is not subject to the one-year limitation.

Assuming that the district court did have the equitable power under this section or otherwise to exempt them from the order and the discharge provisions of section 77(f), we agree that relief was inappropriate here.

In support of their request for relief, Pinney and Litton relied in part upon their evidentiary submission of documents and portions of deposition testimony. Briefly, this evidence indicated that, prior to the 1950's, most of the iron ore from mines in the Great Lakes region traditionally was transported in raw form by ships called "bulkers" over the Great Lakes to receiving docks along Lake Erie, and then by rail carriers, to the steel mills. The ore was removed from the holds of bulkers by heavy dockside cranes called "huletts". Railroad companies owned most of the docks on Lake Erie and these docks were designed for unloading by huletts. The railroads published separate unloading charges for lifting ore from the hold to the side of the ship, lowering ore to railroad cars or to containers used for storage, and moving ore from dock storage to railroad cars. They also published commodity rail line haul rates for transportation from the docks to the steel mills. In the 1950's, however, the producers of iron ore developed a method of converting raw iron ore into pellets for shipment. This development made it possible to transport the iron ore pellets in self-unloading vessels, which used on-board conveyor belt systems to move cargo from their holds to a dock. Most of the railroads informally quoted the same unloading charges for self-unloaders as bulkers, without establishing a tariff to that effect even though huletts were not needed to lift ore from their holds.

Pinney sought to handle the pellets from self-unloading ships at its own dock facilities, which were located next to a dock originally owned by one of PCTC's predecessors, New York Central Railroad Company. The railroad charged a much higher line haul rate from the Pinney dock to the steel mills, however, than from its own dock. Beginning in 1957, Pinney unsuccessfully attempted to obtain a more favorable rate, and in 1969, filed an informal complaint with the Interstate Commerce Commission challenging the rate difference. The Commission's informal mediation was also unsuccessful. Pinney then hired attorneys to investigate whether it should file a formal complaint or take other legal action against PCTC. By the summer of 1975, Pinney began to move iron ore from its dock by truck because negotiations with the railroads had proved to be fruitless.

Litton sought to build and market larger, technologically advanced self-unloaders and self-unloading equipment for sale as well as for its shipping line subsidiary, Wilson Marine Transit Co. Beginning in April 1968, Litton and PCTC attempted to negotiate an agreement to use PCTC's Whiskey Island property, located in the Cleveland harbor, to construct a dock and storage area capable of handling Litton's new ships. Litton could not establish a firm agreement with PCTC, and thus explored alternatives with other railroads, particularly the C&O.

Between 1968 and 1972, Litton and C&O discussed the possibility of using C&O docks at either Fairport, or Lorain, Ohio. Although C&O was amenable to quoting a lower unloading charge for self-unloaders in the 1972 season, all the other railroads objected. C&O then held a railroad meeting in April, 1971, to discuss 1972 charges. Prior to the meeting, Litton told C&O that it objected to the other railroads taking part in C&O's plans with Litton and to their colluding to determine strategy. At the meeting, PCTC told C&O that a reduction in self-unloader

charges would not be advisable. C&O quoted and Litton rejected the same higher charge for the 1972 season. Litton then suggested that it lease a portion of C&O's dock facilities in Lorain. C&O chose not to enter into a leasing agreement in part because of PCTC's advice against such an arrangement. By August, 1973, Litton had stopped building new self-unloading vessels and was seeking a buyer for its shipyard.

The district court stated there was evidence to support the theory of a conspiracy. 42 B.R. at 670-72. Despite evidence in the record to the contrary,[8] the court also assumed that Pinney and Litton did not know and did not have "reason to know of their antitrust claims because of the alleged conspiracy." *Id.* at 675. The determination of whether there was an antitrust conspiracy is before the court in the Cleveland actions, and regardless of whether there actually was a conspiracy, the issue before the court below was whether PCTC engaged in any fraud or other misconduct which prevented Pinney and Litton from filing proofs of claim prior to the consummation date. The court found no direct evidence that PCTC acted in bad faith towards either Pinney or Litton during the reorganization proceedings. *Id.* at 670-72. The court also found that "the record does not reveal conduct by PCTC, over and above the alleged conspiracy itself, which permits the application of some form of equitable estoppel or other finding adequate to over-

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[8] For example, in January, 1973, the President of Pinney decided, against the advice of counsel, not to take any further legal action against PCTC. His decision was apparently based upon business and financial reasons.. Litton was aware of the railroads' meeting in April, 1971, and told C&O that it was not interested in doing business with PCTC, or having PCTC control Litton's business relations with the other railroads. By May, Litton concluded that C&O had capitulated to PCTC and the other railroads, rendering its pursuit of reasonable unloading charges useless. *See* Appendix at 312-17, 504, 521-22, and 546-62.

come the general policy that § 77(f) discharge is final." *Id.* at 675.

Pinney and Litton also relied upon the June 21, 1983 denial of motions for summary judgment filed by PCC's co-defendants in the Cleveland actions. *See Pinney Dock & Transport Co. et al. v. Penn Central Transp. Co. et al.*, 1982-83 Trade Cas. (CCH) ¶ 65,607 (N.D. Ohio 1983), *aff'd on reconsideration*, 600 F. Supp. 859 (N.D. Ohio 1984) and *Pinney Dock & Transport Co. et al. v. Penn Central Transp. Co. et al.*, 1982-83 Trade Cas. (CCH) ¶ 65,608 (N.D. Ohio 1983). The motions were based in part upon the co-defendants' argument that the actions were barred by the four-year statute of limitations of section 4B of the Clayton Act, 15 U.S.C. § 15(b) (1976). Based on evidence similar to that presented below, the Cleveland court found that there was a genuine issue of material fact as to whether the defendants had fraudulently concealed the conspiracy, thus tolling the statute of limitations. *See Baily v. Glover*, 88 U.S. 342 (1874). We note, however, that the legal standard for viewing the evidence was quite different for the court in the Cleveland actions than for the district court here. Rather than viewing the evidence in the light most favorable to Pinney and Litton, the court below had to determine whether they had met their burden of proving by clear and convincing evidence conduct which prevented them from filing their alleged antitrust claims. *Brown v. Pennsylvania R.R. Co.*, 282 F.2d 522, 527 (3d Cir. 1960), *cert. denied*, 365 U.S. 818 (1961). The court reviewed the proof of claim program and found that the PCTC trustees and their staff engaged in no such misconduct. 42 B.R. at 674. The court also reviewed the evidence submitted by the parties and found no fraud or other misconduct by PCTC justifying relief. *Id.* at 675. We have reviewed the record and agree with the court

below.[9] We therefore find that the district court did not commit an error of law, and based on the evidence in this case, it did not commit an abuse of discretion, in denying the requested relief.[10]

## CONCLUSION

We will therefore affirm the decision of the district court for the reasons stated in the above opinion.

A True Copy:

Teste:

*Clerk of the United States Court of Appeals*
*for the Third Circuit*

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[9] Pinney and Litton do not claim any equitable basis for relief other than the *alleged* fraudulent concealment by the debtor.

[10] We also note that the inability to sue PCC as a named defendant in the Cleveland actions does not prevent Pinney and Litton from calling former PCTC officers or employees as witnesses.

## APPENDIX B

## IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

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Bankruptcy No. 70-347

IN THE MATTER OF PENN CENTRAL TRANSPORTATION COMPANY,
*Debtor*

IN PROCEEDINGS FOR THE REORGANIZATION OF A RAILROAD
Re: PETITION TO PURSUE ANTITRUST CLAIMS

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## MEMORANDUM AND ORDER NO. 4243, MAY 22, 1984

FULLAM, District Judge

### I. INTRODUCTION

Pinney Dock & Transportation Company and Litton Industries (petitioners) have sought leave of this court to pursue antitrust actions against the Penn Central Corporation (PCC), the reorganized company which was formed as part of the Plan of Reorganization of the Penn Central Transportation Company (PCTC), the Debtor in these § 77 reorganization proceedings. Petitioners' requests for relief will be denied.

On August 17, 1978, this court entered Orders Nos. 3707 and 3708 which confirmed the Plan of Reorganization of the Penn Central Transportation Company (PCTC) and provided for the consummation of the Plan on October 24, 1978. These Orders will be referred to as the Confirmation and Consummation Orders. Section 77(f) of the Bankruptcy Act provides in part:

> "On confirmation by the judge, the provisions of the plan and the order of confirmation shall . . . be binding upon the debtor, all stockholders thereof, including those who have not, as well as those who have, accepted it, and all creditors secured or unsecured, whether or not adversely affected by the plan, and whether or not their claims shall have been filed, and if filed, whether or not approved, including creditors who have not, as well as those who have, accepted it. . . . The property dealth [sic] with by the plan, when transferred and conveyed to the [reorganized company] provided for by the plan . . . shall be free and clear of all claims of the debtor, its stockholders and creditors, and the debtor shall be discharged from its debts and liabilities, except such as may consistently with the provisions of the plan be reserved in the order confirming the plan or directing such transfer and conveyance [of the debtor's property to the reorganized company]."

A claim is described in § 77(b) as including

> "debts, whether liquidated or unliquidated, securities . . . , liens, or other interests of whatever character."

On consummation of the Debtor's Plan of Reorganization on October 24, 1978, the Debtor's property was transferred to the reorganized company, PCC, free and clear of any claims against that property and the Debtor's liabilities, of whatever character, were discharged.

Section 77(f) is an important aspect of the entire reorganization process. To be confirmed, a plan of reorganization must be feasible and also fair and equitable. A feasible plan is one that provides for the issuance of debt and equity securities of the reorganized company which are appropriate to the reorganized company's ability to generate revenue in excess of operating expenses. The fairness and equity standard requires that the re-

organized company's securities be distributed under the plan in a way which properly reflects the priorities of the debtor's debt and equity holders. The discharge and free and clear transfer provisions of § 77(f) make it possible for the plan participants to exercise intelligently their right to vote for or against the Plan and for the court to apply properly the confirmation standards.

The Consummation Order compliments § 77(f) by enjoining all actions against the reorganized company, PCC, based on claims against PCTC. Notwithstanding this injunction against suits against PCC, Pinney Dock and Litton filed complaints alleging antitrust actions against PCC and others on September 17, 1980 (Pinney Dock) and March 5, 1981 (Litton). These actions were based on conduct of PCTC or its corporate predecessors. For convenience, the two cases will be referred to as the Cleveland actions.

Apparently with PCC's acquiescence, limited discovery was taken in the Cleveland actions. Thereafter, PCC moved for and the district court granted a stay of the Cleveland actions against PCC. Pinney Dock and Litton then filed their petition in this court for relief from the injunctive provisions of the Consummation Order. The matter was fully briefed and argued, and this court entered Memorandum and Order 4206 on September 20, 1983. At petitioners' request, they were accorded a second opportunity to introduce evidence and to conduct an evidentiary hearing. The petitioners then filed a large collection of documentary evidence and deposition excerpts and a second oral argument was held.

The gist of petitioners' antitrust claims is that PCTC and its corporate predecessors were members of an illegal conspiracy from 1958 through 1978, and that the members of the conspiracy, including PCTC and its corporate predecessors, engaged in actions in furtherance of the conspiracy which violated federal and state antitrust laws.

Petitioners' antitrust claims were not satisfied by distributions under the Plan as unsecured creditors because they did not file proofs of claim for these claims. Indeed, they have not as of this date sought leave to file a proof of claim late. By its terms, § 77(f) discharges claims whether or not a proof of claim is filed. Thus, the starting point is that the petitioners' claims are discharged, and PCC has no liability. It is agreed, however, that the petitioners did not have explicit evidence of the alleged conspiracy until 1979, and the petitioners argue that an unknown and undisclosed claim may not be subject to the discharge of § 77(f).

Rather than addressing their argument to the construction or application of § 77(f), petitioners have suggested a different approach. Their requested relief is for an exemption from the injunction provisions of the Consummation Order, and they couch the relevant legal question as one of judicial authority to amend that Order rather than a question of statutory construction or application. There is some appeal to this approach because, as petitioners point out, they may not succeed in the Cleveland actions, and even if they do succeed, the other defendants may satisfy the entire judgment but not have any contribution rights against PCC. As I pointed out in my Memorandum accompanying Order No. 4206, the appeal of this argument is conservation of judicial resources and the avoidance of an unnecessary decision of a substantial legal issue. Avoiding that legal issue, however, would be accomplished at the price of substantially eroding § 77(f). If petitioners' claims are discharged, it is simply wrong to subject PCC to the cost and inconvenience of major antitrust litigation. This conclusion was stated in Memorandum 4206, and the parties were directed to brief the legal issues germane to § 77(f). The parties have fully briefed and argued those matters and they are now ripe for determination.

Petitioners now assert three general lines of argument.

1. Section 77(f) does not bar their claims because they did not receive notice of the proof of claims filing requirement which was adequate under § 77 or the Constitution.

2. If their claims were otherwise discharged under § 77(f), this court has the power to exempt their claims from the discharge and the petitioners have demonstrated equitable grounds warranting such relief.

3. If their claims are discharged and the court either lacks the power or refuses to exempt their claims from the discharge, the petitioners will be denied due process of law. These arguments will be considered separately.

## II. ADEQUACY OF NOTICE

### A. *Proof of Claim Program*

Section 77(c)(7) provides in pertinent part:

> The judge shall promptly determine and fix a reasonable time in which the claims of creditors may be filed or evidenced and after which no claim not so filed or evidenced may participate except on order for cause shown [and] the manner in which such claims may be filed or evidence and allowed.

On December 17, 1970, this court directed the PCTC Trustees to make recommendations for the establishment of a proof of claims program. Participants in the case were also invited to make suggestions, and a hearing was held. The Trustees' estimated that there were approximately 100,000 potential claimants and recommended the use of a standardized proof of claim form and that certain classes of claims be exempted from the filing requirement. On February 18, 1971, Order No. 164 was entered. This Order fixed a filing date of June 1, 1971, for most claims, and required the use of a standard proof of claim form and schedules.

In conformity with § 77(c)(8), which requires that reasonable notice of the time to file claims be given to all creditors, Order No. 164 required the Trustees to mail the proof of claim form, schedules and filing instructions to all known creditors who had to file claims by June 1, 1971. Extensive public notice of the filing date and method for obtaining the necessary forms was also required and given.

Section 77(c)(4) contemplates that the reorganization court will direct the Trustees to file a list of creditors. Under that section, inclusion of a creditor on the list does not constitute the filing of a claim or the admission of liability for any purpose. In late 1970 and early 1971, when the proof of claim procedures were under consideration by this court, it was apparent that filing of creditors lists would be expensive, time-consuming, and of little utility. The main purpose of filing of lists is to ensure that proper notice is given. That goal was achieved by directing that the proof of claim forms be sent to any person who was shown on the Debtor's records as a creditor.

Later an acknowledgement procedure was implemented (Orders Nos. 914, 937), which required the Trustees to acknowledge claims which were consistent with the Debtor's records, and to specify reasons why other claims were not acknowledged. Once claims were acknowledged, they were transferred to a claims docket which was available for inspection throughout the Debtor's service area. If no objections were filed after a claim was put on the claims docket, the claim was allowed.

Over 26,000 unsecured claims aggregating approximately $2.4 billion were timely filed. At the time the Plan was considered by the Court and voted on, approximately $475 million in unsecured claims had been acknowledged by the Trustees. Another $496 million in unsecured claims were in dispute. Of this amount, $358

million was attributable to a single antitrust claim which the Trustees opined was groundless. Of the remaining undisputed claims, the Trustees estimated that the Debtor's liabilities would be approximately $58.5 million.

About 3,000 proofs of claim were filed after the bar date. Again, standardized forms were utilized to simplify the task of claimants seeking to demonstrate good cause for the late filing of their claims (Order No. 914). About half of the late-filed claimants filed the appropriate petitions for relief from the bar order. After providing an opportunity for the claimants to file additional materials and to be heard with respect to their petitions, substantially all of the petitions for relief were granted, Memorandum and Order No. 4097, and approximately $100 million in late-filed claims were then put through the verification process (Doc. No. 17858).

Pinney Dock, Standard Slag Company (Pinney Dock's corporate parent) and Litton all received the proof of claim forms and information. Standard Slag and Litton filed claims, other than those raised in the Cleveland cases, received notice of the Plan proceedings, and voted in favor of the Plan.

Petitioners disparage the documents authorized by Order No. 164 on the ground that they were apt for commercial claims but not for their antitrust claims. No reason for this assertion is given. The proof of claim form required a general description of the claim, and for the most typical types of claims, the completion of a schedule designed to elicit information which would facilitate comparison with the Debtor's records. No "antitrust claim schedule" was included, but this is hardly a defect.

Petitioners' real contention is not a lack of notice of the need to file a claim or the date for filing a claim, but rather that they were entitled to notice of the existence and nature of their claims. No such requirement is con-

tained in § 77, any other section of the Bankruptcy Act, or the Bankruptcy Code.

Well after this reorganization was filed and the proof of claims procedure was implemented, the Supreme Court promulgated rules applicable to Chapter X and § 77 cases (referred to in the Rules as Chapter VII cases), which did change the filing requirements. Section 196 of Chapter X and § 77 require creditors to file claims. Rule 10-401, effective August 1, 1975, and Rule 8-401, effective August 1, 1976, eliminated the need for the filing of claims by creditors whose claims are included on lists filed with the court; however, if the claim is designated as contingent, unliquidated or disputed, a claim must be filed. Under both rules, the court has the power to require all creditors to file claims. Neither rule requires notification to the claimant of whether or not the claimant's claim is listed, and if so, how. These innovative changes in bankruptcy administration were in marked contrast to the mandatory filing of proof of claims in ordinary bankruptcy cases, Bankruptcy Rules 301 and 302, effective August 1, 1973. Since the proof of claims program was largely complete when Rule 8-410 [sic] became effective, that rule was not applicable to this reorganization.

Section 1111(a) of the Bankruptcy Code, applicable to both corporate and railroad reorganizations, codifies the practice of Rules 8-401 and 10-401 by deeming a proof of claim filed for any claim which is listed and not designated as contingent, unliquidated or disputed. Bankruptcy Rule 3003, effective August 1, 1983, complements § 1111(a) of the Bankruptcy Code. Again, under neither the Code nor the Bankruptcy Rule is it necessary for creditors to receive notice as to whether or how their claims are listed. Rather, creditors are free either to file a claim or to consult the schedule to determine the manner in which they are listed.

*New York v. New York, New Haven & Hartford R.R. Co.*, 344 U.S. 293, 73 S.Ct. 299, 97 L.Ed. 333 (1953), which is relied on by the petitioners, does not support the petitioners' contention. There, New York City and other known creditors were not advised by mail of the bar date for filing claims. New York City did not file certain real estate tax claims and the lower courts held New York City's real estate liens were void. Publication notice of the bar date was found adequate. The Supreme Court reversed, holding that § 77(c)(8) required reasonable notice and that notice by publication was not reasonable notice to creditors known to the trustee. Notice by mail was required. Nothing in this case suggests that New York City was entitled to anything other than mail notice of the bar date.

The *New Haven* holding was applied in this circuit in *In re Harbor Tank Storage*, 385 F.2d 111 (3d Cir. 1967). A bulk oil storage concern filed a Chapter X reorganization proceeding. During the course of the proceeding, the debtor delivered about 75% of the tung oil owned by a claimant. The other 25% was missing. The claimant and the trustees cooperated in the claimant's effort to recover its loss from an insurance carrier. At no time was the claimant notified of the bar date or the plan proceedings and the trustee failed to respond to inquiries from the claimant about the reorganization. Almost immediately after the plan was confirmed, the claimant filed a petition for leave to file a proof of claim *nunc pro tunc*. The reorganization court denied the petition, but the court of appeals reversed, holding that under the *New Haven* case the claimant was entitled to mail notice of the bar date. The procedural posture of the *Harbor Tank Storage* case was different from that in the *New Haven* case in that in *Harbor Tank Storage* a plan had been confirmed; however, the claimant sought relief before the plan was consummated. The Court of Appeals remanded the matter to the reorganization court

for a determination of whether the claim belonged in class 4 or class 5. Class 4 claims, which totaled $73 million, were to receive securities of the reorganized company and certain litigation proceeds. Class 5 claims were to be paid in cash. There was no suggestion that recognition of the claimant's $22,000 claim would have any significance to the overall plan.

In sum, it is clear that in these proceedings the petitioners received notice of the bar date which satisfied both the statutory mandate of reasonable notice and the due process clause.

B. *Section 77(c)(4)*

Petitioners assert § 77(c)(4) imposes on the Trustees an independent obligation to disclose to the petitioners the possibility that they had antitrust claims against the Debtor.[1] Section 77(c)(4) provides, in pertinent part:

> The judge shall require the officers of the debtor or the trustee or trustees . . . to . . . submit such other information as may be necessary to disclose the conduct of the debtor's affairs and the fairness of any proposed plan.

Throughout the course of the reorganization the Trustees filed with the court frequent and extensive reports on operations and plan formulation. In connection with the plan, comprehensive financial information and other data relevant to the fairness of the plan was disclosed, extensively circulated, and exposed to intense adversary analysis. Included in the material provided was information about the proof of claim program and the liquidation of claims.

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[1] Petitioners also couch their § 77(c)(4) argument under the rubric "fraud on the court." The reasons for rejecting the defective notice argument apply equally to the fraud-on-the-court theory.

Although extensive discovery was taken, it is conceded that the Trustees and their staff had no knowledge of any facts which suggested that the petitioners had antitrust claims against the Debtor. Petitioners contend that the Trustees' lack of knowledge is not determinative because the Debtor's files contained documentary evidence of the alleged conspiracy and officers of the Debtor acted in furtherance of this conspiracy during the reorganization. Petitioners reason that the availability of information concerning their antitrust claims demonstrates that the Trustees breached their duty to adequately report on the potential liabilities of the Debtor.[2] In essence, this line of reasoning is quite similar to the argument that the notice of the proof of claims procedure was defective.

Petitioners' theory is based on the accepted proposition that the trustees of a § 77 debtor have a fiduciary duty to the court and all those who have an interest in the estate. It is also permissible to assume for the purposes of discussion that a breach of this duty may create rights in those adversely affected by a breach of fiduciary duty. Indeed, *Harbor Tank Storage* may be viewed as an illustration of this assumption. But § 77(c)(4) must be read in conjunction with the obligation imposed by § 77(c)(7) on creditors to file proofs of claim. For example, if the claimant in *Harbor Tank Storage* had been given notice of the bar date but did not file a proof of claim, the trustee would have been obliged to object to the claimant's petition to file a late claim and the objection would have been sustained unless the claimant could demonstrate "cause" for late filing.[3] The basic point is that the bar order entered under § 77(c)(7) plays a central role in defining those entitled to participate under the plan. Acceptance of the petitioners' position that any and all

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[2] Petitioners' distinction between the asserted duty of the Debtor and the Trustees to investigate is not pertinent.

[3] See the discussion of *Meyer v. Fleming, infra.*

claims which might be supported by information in the Debtor's files are exempt from the proof of claim requirement would totally frustrate the entire reorganization process.[4]

Although petitioners' § 77(c)(4) argument is not persuasive, petitioners have combined that argument with a duty-to-investigate argument. Section 77(c)(9) contemplates that the court will direct the Trustees to investigate the management of the Debtor's affairs to determine whether the estate has any claims against third parties. Rule 8-208(3) includes in the list of the trustee's duties the duty to investigate liabilities of the debtor, and Rule 8-208(4) provides that the trustee shall "file a report with the Court concerning any facts ascertained by him pertaining to fraud, misconduct, mismanagement, and irregularities, and to any causes of action available to the estate."[5] Although the duties listed in Rule 8-208 became effective on August 1, 1976, and go beyond the literal meaning of § 77(c)(9), there is no question but that the Trustees had a duty to investigate the liabilities of the estate. It is the trustee of a § 77 debtor who has the primary burden to object to a proof of claim.

Petitioners take this duty to investigate to its logical extreme by asserting that it was incumbent on the Trustee to interrogate the officers and employees of the Debtor and to search all the files in the possession of the Debtor to determine whether there were any potential liabilities other than those asserted in the proof of claim program. There is no precedent which even intimates that a trustee in a reorganization has a burden approaching that suggested by petitioners.

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[4] The Trustees completed an exhaustive search of their accounting records in an effort to send notice of the proof of claim program to anyone who might have had a claim.

[5] Section 1106(a)(3), (4) of the Bankruptcy Code imposes the same duties on trustees in reorganizations under the Code.

The Penn Central reorganization was a very complex and often fast-paced proceeding involving important economic stakes for the economy of the Northeast. As a matter of law and fact, I am completely satisfied that the Trustees discharged their fiduciary duties fully.

Two other matters warrant mention. First, it is not clear that even if the Trustees had all the Debtor's files before them, the alleged illegality of the conduct would have been apparent or that the action of the Debtor's employees which are relied upon by the petitioners were related to the alleged conspiracy. These issues are at the heart of the Cleveland actions. Second, assuming a factual and legal basis for concluding that the Trustees failed to satisfy their duty under § 77, the nature of the remedy, if any, to be afforded is an open question. Petitioners' request for relief came well after the Plan was confirmed and the reorganization securities were widely dispersed in the public markets.

III. Exemption from the Discharge of § 77(f)

A. *Section 77(c)(7)*

Section 77(c)(7) authorizes the court to permit the late filing of claims on "cause shown". This standard is taken from the equity receivership practice, and has been summarized by the Supreme Court to permit late filing "provided the claim is equitable, the claimant is not chargeable with *laches*, and the assets have not been distributed; and provided further that the late filing does not unduly delay proceedings." *Meyer v. Fleming*, 327 U.S. 161, 169 n. 18, 66 S.Ct. 382, 387 n. 18, 90 L.Ed. 595 (1946) (citations omitted). Few cases of recent vintage have discussed this rule in detail.[6] Presumably,

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[6] See *In re United Cigar Stores*, 82 F.2d 744 (2d Cir. 1936). In this reorganization the rule of *Meyer v. Fleming* was applied in deciding whether claims filed after the bar date but before confirmation of the plan would be permitted to participants under the plan. See p. 665, *supra*.

petitioner's awareness of this long-established interpretation of § 77 explains why the petitioners have never invoked § 77(c)(7). Even if the petitioners' filing of their Cleveland actions in 1980 and 1981 were treated as requests to file a late claim, no relief would be appropriate because the Plan of Reorganization had been confirmed and billions of dollars in reorganization securities and cash had been distributed pursuant to the Plan well before the filing of the Cleveland actions.

Petitioners seek to avoid the impact of § 77(c)(7) by focusing their request for relief on the Consummation Order. As already pointed out,[7] Petitioners' approach autually raises the issue of the finality of the Confirmation Order: Does this court have authority to exempt petitioners' antitrust actions or claims from the discharge of § 77(f)? Of course, if the "for cause shown" proviso of § 77 is the exclusive method available the petitioners to achieve participation under the Plan, relief from the Confirmation Order is not appropriate.

Section 77 does not contain any explicit authority for modification of a confirmed plan of reorganization. In 1947, the Supreme Court rejected a railroad debtor's efforts to reopen a confirmed plan of reorganization and to modify that plan. *Insurance Group Committee v. Denver & R.G. W.R. Co.*, 329 U.S. 607, 67 S. Ct. 583, 91 L.Ed. 547 (1947). The debtor railroad attacked the plan on the ground that improvements in the economy since the original hearings on approval and confirmation of the plan were such that the plan was no longer fair and equitable to junior creditors and stockholders. Congress responded to the Supreme Court's ruling in 1948 by enacting P.L. 478.[8] This legislation was applicable to § 77 reorganizations and authorized the Interstate Commerce Commission or the reorganization court to recon-

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[7] See p. 661, *supra*.

[8] Reprinted in 10 *Collier* 1861 (14th ed.).

sider confirmed plans which had not yet become final. The thrust of the legislation was to create an opportunity for junior creditors and stockholders to bring to the court's attention "changes, facts, or developments . . . since approval of [the] plan" which might demonstrate that the plan was no longer fair and equitable. Under P.L. 478, once an order of confirmation became final, the court could not reconsider or modify the plan. Finality of a confirmation order was defined to be the expiration of the time within which to take an appeal or the exhaustion of appeals which were taken.

The scheme of § 77 is generally consistent with the other chapters of the Act and the Bankruptcy Code. Chapters X and XI of the Act, which were enacted after § 77, do deal with modification to a confirmed plan. Section 222 of Chapter X authorizes the court to modify a confirmed plan of reorganization if the plan participants accept the modification; however, under § 229, once a plan is consummated by transfer of the debtor's property, assumption of the business operations by the reorganized company, or distribution of the plan securities, the plan may not be modified. A Chapter XI plan of arrangement providing for the extension of the time for the payment of creditors may be modified even after confirmation provided the debtor has not yet distributed negotiable paper to the creditors participating under the plan. On the other hand, § 386 permits revocation of an order confirming a Chapter XI plan on the ground that confirmation was procured by fraud if a motion for such relief is made within six months of confirmation of the plan.

These provisions of the Act have been assimilated into the Bankruptcy Code. Section 1127(b) of the Bankruptcy Code authorizes modification of the confirmed plan "before substantial consummation of such plan," and § 1144 authorizes revocation of a confirmed plan because of fraud in its procurement if a motion for such

relief is made within 180 days of confirmation of the plan. An order entered under § 1144 must "contain such provisions as are necessary to protect any entity acquiring rights in good-faith reliance on the order of confirmation."

When § 77 and P.L. 478 are considered together in the context of the finality accorded plans of reorganization and arrangement under Chapters X and XI of the Act, the conclusion which must be drawn is that a § 77 plan of reorganization may not be altered once the order confirming the plan becomes final. Even if it is assumed that this court has residual equitable power to permit petitioners to participate under the PCTC's Plan of Reorganization, any potential exercise of that authority at this late date must be considered in the context of the long-standing bankruptcy policy that confirmation orders are final and that the rights of the original participants under the Plan and third parties dealing in reorganization securities must be adequately protected.

B. *Equitable Grounds for Relief*

Petitioners have introduced a large collection of documents and deposition excerpts in support of their contention that there are equitable grounds for exempting them from the effect of the Confirmation Order. Since this theory is novel to bankruptcy law, it is not surprising that petitioners have framed their arguments in terms of opening the Consummation Order pursuant to Rules 60(b)(3) and (6). These provisions of the Civil Rules permit the opening of a judgment when fraud or any other reason justifying relief is found.

In addition to reliance on Rule 60(b), petitioners have implicitly relied on the tolling principles applicable to the antitrust statute of limitations. In general, an antitrust claim arises when an overt act in furtherance of an illegal conspiracy harms the putative plaintiff; however, if the conspiracy is concealed from the plaintiff,

the statute of limitations is deemed tolled. In the Cleveland actions, Judge Thomas was apparently presented with an evidentiary submission by petitioners similar to that presented to this court. In ruling on summary judgment motions by PCC's co-defendants, Judge Thomas held that there was a genuine issue of fact for the jury on the concealment issue. In addition to relying on Judge Thomas' holding, the petitioners have presented their factual evidence to this court on the theory that PCTC and its predecessors concealed the conspiracy from the petitioners, and that this concealment is a proper basis for granting equitable relief from the discharge provisions of § 77(f).

In the Memorandum accompanying Order No. 4206, I pointed out that "facts which might justify a finding that the statute of limitations is tolled may not constitute an appropriate basis for an exemption from § 77(f)." After having the benefit of additional briefs, I am satisfied this conclusion is correct.

Tolling of the antitrust statute of limitations because of concealment of an illegal conspiracy is not part of the antitrust legislation, but rather is a doctrine of federal common law having its origin in *Bailey v. Glover*, 88 U.S. 342, 21 Wall. 342, 22 L.Ed. 636 (1874). Application of the tolling doctrine in antitrust cases is fully consistent with the deterrent purpose of the treble damage provisions of the antitrust laws and the importance of private enforcement of the antitrust laws.

Bankruptcy proceedings introduce a far different situation. Section 77(b) provides that "all statutes of limitations shall be suspended during the pendency of a proceeding under this section." In lieu of the applicable statute of limitations, the bankruptcy law and § 77 in particular substitute the proof of claims procedure. Although the time for filing claims in straight bankruptcies is ab-

solute,[9] the "for cause shown" proviso of § 77(c)(7), is more liberal. Claims not asserted in a timely manner or exempted from the filing date are barred by the discharge.

The concealment standard for tolling of the antitrust statute of limitations is designed to ensure achievement of the substantive policies of the antitrust laws. On the other hand, any modification of a confirmation order is antithetical to the objectives of the bankruptcy laws. Therefore, petitioners' evidentiary materials must be evaluated without any preconceived relationship between the concealment standard and what might constitute appropriate grounds for relief from a confirmation order.

1. *Common Factual Background*

Petitioner's evidentiary submissions have a common factual background. Much of the iron ore used by steel plants in Northern Ohio and Pennsylvania was transported over the Great Lakes to docks on Lake Erie and then moved by rail to the steel plants. Until the 1950s, the iron ore was shipped by vessel in raw or bulk form. At the Lake Erie docks the ore was removed from the ships by dockside equipment known as huletts and placed directly in rail cars or stored on the dock for later rail shipment. In the late 1950s, the iron ore suppliers developed the capability to produce iron ore pellets. Pellets could be unloaded from vessels by use of conveyor systems built into the vessels. A number of the vessels on Lake Erie, known as self-unloaders, had conveyor systems which had been developed for use with other cargoes.

The combination of the availability of pellets and self-unloader vessels to carry the pellets altered the situation on Lake Erie in two ways. First, docks without huletts could now receive iron ore cargoes. Second, the docks with huletts were confronted with the possibility of losing car-

[9] *In re James Pigott*, 684 F.2d 239 (3d Cir. 1982).

goes to docks without huletts and the docks with huletts had to decide how to structure the handling charges for cargoes which did not require use of huletts.

Most of the docks on Lake Erie were owned by railroads and those dock facilities were designed and equipped for the traditional hulett offloading of raw iron ore. Pinney Dock was one of the few private docks on Lake Erie. Pinney's facility is located next to what was originally the New York Central's dock in Ashtabula, Ohio.

The primary impediment to Pinney Dock's handling of ore pellets was the rates charged for moving ore from the Lake Erie docks to the steel mills. Cargoes unloaded at railroad docks cost less to move by rail than cargoes unloaded at Pinney Dock. In general, the higher rail cost offset the benefit a steel company might obtain by bringing self-unloaders to Pinney Dock. Pinney Dock's claim in its Cleveland action is that this cost differential was the product of an illegal conspiracy among the Lake Erie rail carriers.

Litton's involvement in Lake Erie stated in the mid-1960s. At that time the Lake Erie fleet had very few self-unloaders, and the available self-unloaders were relatively small, labor-intense to operate, and not capable of unloading cargoes any significant distance from where the vessel was berthed. Litton's business objective was to design, build and sell a new and larger self-unloader which could be operated with a small crew and have the capacity to off-load the cargo a greater distance from the vessel.

Litton acquired and developed a shipyard in Erie, Pennsylvania. One Litton super self-unloader was sold to Bethlehem Steel. The second vessel built by Litton was eventually sold to a Litton subsidiary, Wilson Marine. Litton's efforts were not limited to the marketing of self-unloaders. It also sought to present itself as the firm capable of designing and building more advanced handling equipment and systems which would be integrated with

their self-unloaders to produce more cost-efficient handling of iron pellets.

Generally speaking, self-unloaders would only be attractive acquisitions for shipping companies if the steel mills had an incentive to use those vessels because of lower aggregate shipping costs. The railroad owned docks, with but minor exceptions, imposed the same handling charges for self-unloaders as they did for vessels which were unloaded by railroad huletts. During the time Litton sought to market its self-unloader, the railroads on Lake Erie refused Litton's request to establish formally a lower handling charge for self-unloaders. In this situation, the only economy the new self-unloaders offered was in the vessel portion of the shipment. Apparently, that saving was not sufficiently attractive to potential purchasers of the vessel to justify the capital expense of acquiring Litton's self-unloader. Litton produced only two vessels and closed down its Erie shipworks after the second vessel was completed in 1973. Litton's antitrust claim is that its failure in the self-unloader business was attributable to an illegal conspiracy among the Lake Erie carriers.

Railroad rates and dock charges were subject to regulation by the Interstate Commerce Commission (ICC). A unique aspect of the ICC regulatory scheme was § 5a of the Interstate Commerce Act. Section 5, which was originally in Reed-Bulwinkle Act, authorized railroads to participate in joint rate-setting arrangements when approved by the ICC. The Lake Erie carriers set rates pursuant to an ICC-approved agreement. 277 I.C.C. 279 (1950). Actions taken pursuant to an approved rate-setting agreement are not subject to the antitrust laws. In the Cleveland actions, the court has denied a summary judgment motion by PCC's co-defendants based on the § 5a immunity. The issues before that court involve the substantive scope of the immunity and whether actions of the railroads alleged by Pinney and Litton as violating the antitrust laws are protected by the immunity.

Railroads participating in rate-setting arrangements were authorized by statute to depart from the rates set under the agreement. This right of independent action, which is specifically recognized in the § 5a agreement, and the general existence and functioning of the § 5a agreement form the legal context in which the railroads operated. Many of the events which are the subject of the petitioners' evidentiary submission involve the "Rate Committee" [10] which administered the § 5a agreement and efforts by Pinney and Litton to have PCTC, or its predecessor, New York Central, exercise its right of independent action. Nothing contained in the discussion of the petitioners' evidentiary submission is to be taken as expressing a view concerning the scope of the antitrust immunity or whether the conduct in question is protected by § 5a.

2. *Pinney Dock*

Prior to the filing of PCTC's reorganization petition in June of 1970, Pinney Dock sought to handle iron ore cargoes on two occasions. In 1957, a steel mill expressed interest in using Pinney Dock to handle a self-unloader cargo. Although the New York Central proposed to the Rate Committee that a favorable rate be published, none was ever published, and Pinney did not handle the offered cargo. A similar situation developed in 1968. A steel mill was interested in using Pinney Dock to receive a self-unloader cargo. The mill inquired of PCTC concerning the availability of a favorable rail rate from Pinney Dock to the mill. PCTC did not quote the line haul rate from its dock, but rather the higher rate generally applicable from Pinney's dock. The mill did not utilize Pinney Dock, and Pinney pressed PCTC for an explanation of its refusal to quote a lower rate. It was informed that PCTC's

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[10] The formal name is the Coal & Coke & Iron Ore Committee. The Railroad Revitalization & Regulatory Reform Act of 1976, amended § 5, and the current version is codified at 49 U.S.C. § 10706.

action was due to a recommendation of the Rate Committee. Pinney was not satisfied, and in the fall of 1968 PCTC reiterated the point that it was "bound by [the Rate Committee's] recommendation," but the PCTC official also offered the reason that the lower rate was designed for high-volume shipments on a regular basis, and that giving Pinney the lower rate would be "damaging to the railroads and to the iron ore shippers." This latter point had been communicated to Pinney indirectly by the steel mill involved, which had informed Pinney that PCTC regarded Pinney as a direct competitor with PCTC's Ashtabula dock operation.

In January of 1969, Pinney invoked the ICC's informal procedures to challenge PCTC's rate structure for iron ore shipped from its dock. An ICC informal proceeding basically involves an effort by the ICC staff to mediate the shipper-railroad dispute. The ICC's remedial authority may not be exercised as part of an informal proceeding. PCTC refused to make any concessions and defended its higher rates from Pinney's dock. After the informal complaint procedure proved fruitless, Pinney engaged counsel to evaluate the possibility of filing a formal complaint.

Pinney's analysis of the 1968-69 events is that the reasons offered by PCTC for not awarding Pinney favorable rates was false: the real reason was that PCTC was acting in furtherance of the alleged conspiracy. PCC argues a much different inference: the clear reference to a recommendation of the Rate Committee put Pinney on notice that PCTC was acting with the other railroads to protect the existing business arrangements of PCTC and the other railroads. Resolution of this dispute is not necessary to decide the issues before this court. Suffice to say, there is evidence supporting Pinney's contention. What is clear is that Pinney aggressively sought a favorable rail rate from its facility and was unsuccessful.

Beginning in the fall of 1970, Pinney Dock and PCTC explored the possibility of some form of joint arrange-

ment in Ashtabula. An implicit assumption of these discussions was that if an arrangement was worked out, PCTC would move cargoes from Pinney Dock at the same rate cargoes were moved from PCTC's dock. In the summer of 1971, PCTC objected to Pinney Dock's effort to obtain the requisite regulatory approvals to improve its harbor facilities. PCTC contended that Pinney Dock's proposed dredging and other harbor improvements would adversely affect PCTC's Ashtabula dock. This opposition by PCTC was perceived by Pinney as inconsistent with any joint effort and apparently the discussions were terminated.

During the spring of 1971, PCTC and other railroads made known their opposition to any regularized departure from the industry practice of imposing the same per-ton charge for self-unloaded and hulett-unloaded cargoes. Pinney argues that PCTC's action on the self-unloader charge issue and PCTC's opposition to Pinney's harbor expansion demonstrate that PCTC's exploration of a joint arrangement between Pinney and PCTC was merely a ruse. There is no direct evidence to support the ruse theory and, if anything, the record suggests that PCTC was actually pursuing the simpler strategy of treating Pinney as a competitor until they became partners. In any event, by the summer of 1971, Pinney concluded that PCTC was not really interested in going forward with a joint arrangement.

The record does not focus on what went on between PCTC and Pinney between the summer of 1971 and 1974. In mid-1974, the possibility of a joint arrangement between Pinney and PCTC was actively discussed again. Apparently, this was part of PCTC's continuing analysis of the Great Lakes iron ore traffic and PCTC's capability to obtain a substantial share of the rail traffic generated on the Great Lakes. Exactly how these discussions progressed is not fully developed in the record, but apparently the April 1, 1976 takeover of PCTC's rail

property by ConRail precluded any joint arrangement. In the late summer of 1975, Pinney officials were hopeful that it would obtain favorable rates without having consummated a joint arrangement with PCTC.

In the fall of 1975, Pinney took another tack. The ConRail takeover had created the possibility of another railroad getting trackage rights to serve Pinney's facility and Pinney pursued that possibility. Pinney did not obtain the rate immediately and shifted its focus to the use of trucks, and by mid-1976 Pinney was moving substantial quantities of iron ore by truck.

On April 1, 1976, PCTC conveyed its rail properties to ConRail. Petitioner's evidentiary submission does not contain any evidence that PCTC was in any way involved in subsequent events affecting Pinney.

This summary of the evidence submitted by Pinney is consistent with findings proposed by Pinney. PCC has developed its own factual case designed to demonstrate that Pinney had enough information to conclude that it had an antitrust conspiracy claim against PCTC. Essentially, this same argument was the basis of a summary judgment motion by PCC's co-defendants in the Cleveland action. The Cleveland court denied summary judgment on the ground there was a genuine issue of fact. For the purpose of this proceeding, it will be assumed that Pinney did not have reason to know of the evidence supporting the alleged conspiracy claim.

Once one eliminates the adjectives used by Pinney to characterize PCTC's conduct, the factual evidence boils down to a single point. PCTC never refused absolutely to grant Pinney a favorable rate, but rather entertained Pinney's requests to work something out. In 1971, Pinney concluded PCTC would not cooperate. In 1974, new discussions were held, but they were not successful. Pinney initiated these discussions. These events must, of course, be examined in the context of how PCTC's con-

duct relates to Pinney's failure to file a claim in the reorganization proceeding.

3. *Litton*

Litton's primary dealings with PCTC involved the potential development of Whiskey Island, which is located in the Cleveland harbor. Litton's Wilson Marine was in the process of proposing a long-term shipping contract to Republic Steel. Litton needed a suitable unloading facility to accommodate its self-unloaders and to store ore for shipment up river to Republic. A large portion of Whiskey Island was vacant and suitable for Litton's purposes.

From April of 1968 through the summer of 1969, PCTC and Litton discussed the possibility of developing the vacant land on Whiskey Island as a dock and storage area for self-unloader vessels. From the outset, PCTC and Litton recognized that each firm had different objectives and considerations. Nonetheless, they embarked upon a joint feasibility study. PCTC was concerned that a PCTC-Litton joint venture which excluded other users from any new facility, as Litton had proposed, would not sit well with many of PCTC's other steel customers and that the reduced cost of delivering of ore to the Lake Erie ports might reduce the competitiveness of imported ore which PCTC moved from the East Coast inland.

PCTC's first suggestion was that Litton would lease a large portion of the Whiskey Island property from PCTC on a fixed rental plus royalty basis. As part of the lease arrangement, PCTC wanted Litton to charge a price for moving the ore from Whiskey Island up river that was in excess of Litton's actual costs. PCTC's motivation apparently was to keep the relative competitive positions of the various steel mills stable. Acceptance of this stipulation by Litton would have reduced the overall benefit to any steel company of using a Litton facility on Whiskey Island. In April of 1969, PCTC

made a new proposal. PCTC would construct the necessary facility to service Litton's vessels and charge Litton a fixed per-ton charge. A condition precedent to undertaking the capital improvements necessary was that Litton obtain a long-term shipping contract with the steel mill. Although Litton did not object to the rate of return on investment that PCTC used in calculating its per-ton charges, Litton was of the view that the per-ton charges would yield a return in excess of PCTC's required return on investment. Litton made a counter proposal that it would build and have sole control over the Whiskey Island facility.

At this time, Litton was under substantial time pressure to make a final proposal to Republic and, because there was no firm agreement with PCTC, Litton explored a new plan for unloading ore in the Cleveland harbor. When PCTC found out Litton was pursuing this alternative approach, PCTC informed Litton that it considered itself free of its earlier promise not to pursue independently or with others the development of Whiskey Island. PCTC and Litton did agree that they would continue to evaluate the proposed joint venture.

The PCTC vigorously opposed Litton's alternative approach for unloading ore in the Cleveland harbor. This was apparently motivated by concerns as to the adverse impact of vessel traffic in the harbor and also for competitive reasons. By the summer of 1969, the Whiskey Island discussions were for practical purposes at an end.

At the time of the negotiations, Litton's executives believed PCTC did not comprehend the potential significance and value of Litton's approach to both Litton and PCTC. Litton now labels the Whiskey Island negotiations as a sham. There is no direct evidence PCTC bargained in bad faith. What is clear is that PCTC was not willing to make the concessions which Litton felt were necessary to make the Whiskey Island proposal satisfactory to Litton.

Litton had direct contact with PCTC in two other situations. In January of 1971, Litton knew that PCTC had formally proposed to the Rate Committee that a tariff imposing a $1.41 per-ton charge be imposed on self-unloaders using railroad docks. This charge equaled the total charges applicable to bulk cargoes. Litton protested to PCTC. Prior to the protest, PCTC had already determined that the other Lake Erie carriers would not publish this rate, and PCTC decided to drop its proposal. Litton makes much of the correspondence between Litton and PCTC concerning the proposed charge, and contends that PCTC falsely represented to Litton that the proposed charge was not intended to apply to self-unloaders. Litton's contention is not supported by the record. PCTC responded to Litton's draft protest letter by asserting that Litton was incorrect in its view that ordinarily the only fee charge self-unloaders was the 43¢ per-ton charge for moving ore from dock storage to rail cars. PCTC asserted that the published charges, including the 43¢ per-ton charge, were only applicable to bulk cargoes where railroad equipment was utilized for unloading. Nothing in PCTC's response suggested that the proposed $1.41 per-ton charge was intended to apply to anything but self-unloaders.

In May of 1971, Litton began discussions with Pinney Dock. Although Litton found Pinney Dock's facilities quite adequate and attractive, Litton was unable to work out an arrangement with Pinney Dock because PCTC's rail rates applicable from Pinney Dock's facilities were higher than the rail rates available from railroad docks.

The last two aspects of the evidentiary submission relate to PCTC's approach to the sale of its real estate in Erie, Pennsylvania, and Litton's negotiations with the C&O Railroad.

Erie, Pennsylvania, is located on Lake Erie, and for many years was an active port. Apparently by the mid-

1960s, the Erie Docks were not actively involved in the ore trade. In 1967, the City of Erie, which already owned substantial lakefront property, contracted with the Pennsylvania Railroad to purchase 45 acres of lakefront property for the development of a park and recreational facility. Before closing the sale transaction, PCTC sought to add to the deed a restrictive covenant against commercial use and reverter clause. PCTC's objective was to prevent the parcel from later being developed by the City of Erie for commercial dock purposes or sold by the City of Erie for use as a self-unloader facility. The dispute between Erie and PCTC dragged on for a number of years. The property was eventually conveyed to Erie with a 10-year restrictive covenant.

Early in 1970 another company approached PCTC with a lease proposal. This was rejected because PCTC felt that if the proposed lease was consummated, the lessee would be able to cancel its existing lease with the Erie Port Authority, and the Erie Port Authority could then utilize the ground which was previously leased for a self-unloader facility.

PCTC was also concerned that Litton might obtain waterfront land in Erie by acquiring an outstanding option on 68 acres of PCTC land which at one time had been an ore dock. PCTC had leased the parcel with an option to purchase to a large industrial firm which already owned 250 acres in Erie. Litton did obtain an option to buy both PCTC's land and the other 250-acre parcel. Litton never exercised its option and the original PCTC option lapsed.

After the option lapsed, the City of Erie initiated discussions with the PCTC Trustees to purchase the ore dock property. PCTC executives opposed this sale on the ground that it might result in the development of a self-unloader facility. Another firm made a competitive offer for the ground which included a restrictive covenant that

it would not be used for ore unloading. PCTC found this proposal acceptable because it protected their competitive position. Although the record is not clear, it appears that some years later, after the transfer of PCTC's rail properties to ConRail, the property was eventually sold to the Erie Port Authority.

Litton acknowledges that it had no knowledge of PCTC's position concerning the development of PCTC's Erie property. Thus, the Erie real estate transactions do not constitute any evidence that PCTC's conduct had any effect on Litton's failure to file a claim in these proceedings.

As early as 1968, Litton explored with the C&O Railroad the possibility of using either its Fairport or Lorraine docks to handle self-unloaders. Litton's interest in these facilities became more intensive in mid-1970, and from that time until mid-1971, Litton actively pursued an arrangement with the C&O to use the Lorraine docks. The Lorraine docks were losing money at that time because of low volume, and the C&O staff evaluated the Litton proposal on the basis of having a combined operation which retained the C&O's bulk traffic and also accommodated Litton's self-unloader traffic. Internal C&O studies indicated that on a purely incremental cost basis, Litton's proposed 25¢ rate would be compensatory.

In early 1971, Litton pressed the C&O for a rate quote and was given the C&O's established rate of 65¢ per ton. This rate was offered for the 1971 season. C&O then convened a meeting in April of 1971 of the Lake Erie ore carriers to discuss 1972 handling charges. C&O suggested a possible handling rate of less than the 46¢ per-ton storage-to-car charge then applicable to bulk cargoes. All the other railroads objected. PCTC viewed the rate as a decided preference for the steel mills which had arrangements with Litton and predicted that if the handling rate was lowered below the ordinary cost charged

bulk vessels for direct loading to cars, 65¢, PCTC would be forced to reduce its bulk vessel charges to equalize the steel companies' costs. The C&O was also advised that some of its steel company customers would be quite unhappy if the C&O-Litton deal disadvantaged them because they only had access to bulk vessels.

The C&O eventually quoted the 65¢ per-ton charge to Litton for the 1972 season, and Litton rejected the offer. From May through July 1971, Litton pursued the idea of leasing a portion of the Lorraine docks to unload and store ore pellets. This was ultimately rejected by the C&O for a number of reasons. Leasing the property to Litton would, in effect, have given Litton's shippers a lower unloading cost and thereby triggered the possibility of reduced bulk vessel charges on Lake Erie. This possibility was made known to the chief executive officer of the C&O by a letter from the then-chief executive officer of PCTC. At some time in the summer of 1971, the C&O-Litton discussions terminated.

Litton knew of the April 1971 meeting of railroads to discuss the C&O's plans for handling Litton cargoes and prior to the meeting conveyed to officials of the C&O Litton's view that it objected to the idea of the railroads colluding to determine strategy on lake transfer terminals.

4. *Appropriateness of Relief*

The evidentiary submissions must be considered in the relevant legal context. Petitioners' approach of seeking relief from the Consummation Order rather than the statutory discharge of § 77(f) permits them to cast the issue as an application of Rules 60(b)(3) and (6) of the Federal Rules. These rules are ordinarily relevant after litigation has been concluded and a party to the litigation seeks to vitiate the finality of the judgment because of the opposing party's conduct in the course of the litigation. No traditional litigation between petitioners and PCTC preceded entry of the Consummation and Confirma-

tion Orders; however, the proof of claims program and the plan and confirmation proceedings may be viewed as analogous to traditional litigation. There is no basis for relief under Rule 60(b)(3) or (6) because, as I have already concluded, the Trustees and their staff properly administered the proof of claims program and performed their fiduciary duties properly without engaging in any improper conduct in the Plan and confirmation proceedings.

It is contended that PCTC's "misconduct contributed to, if not caused, petitioners' failure to learn of their antitrust claims prior to entry of the Consummation Order." This type of contention would not ordinarily be the basis for relief from a judgment under Rule 60(b) because the omission of a claim does not affect the validity of a judgment on another claim. Instead, the omission of a claim gives rise to the possibility *res judicata* will be an affirmative defense to a second action by the party who omitted the claim. A given jurisdiction may recognize an exception to the *res judicata* doctrine when a party's failure to litigate a claim in the first action was attributable to conduct of the opposing party in the first action. *Restatement of Judgments 2d*, § 28, Comment J. Whether or not there has been any previous litigation, the lack of knowledge of or reason to know of a claim may, depending on the applicable state or federal law, toll the statute of limitations. Petitioners are relying on the federal tolling doctrine in their Cleveland actions.

When a jurisdiction establishes an exception to the policy of finality underlying the doctrine of *res judicata* or the statute of limitations, the purpose is to achieve justice among the parties by preserving potentially valid claims.

Section 77 of the Bankruptcy Act accepts the underlying state and federal law which determines whether a claim is barred by the doctrine of *res judicata* or the statute of limitations. An entirely independent set of re-

quirements are imposed by § 77 in order to carry out the policies of the bankruptcy law. Claims must be filed in a § 77 reorganization within the time fixed by the reorganization court, subject to the liberal provision of § 77(c)(7) for filing claims late. Under § 77 and the Bankruptcy Code, claims which are asserted after confirmation and consummation are discharged and there is no exception made for claims which were unknown to a claimant until after consummation of the Plan.[11]

Thus, assuming Pinney and Litton neither knew nor had reason to know of their antitrust claims because of the alleged conspiracy, their lack of knowledge would not be a ground for exemption from the discharge. The record has been analyzed in detail to determine whether there are other circumstances which might warrant a judicially forged exception to the discharge. If petitioners had asserted their claims before the Plan was approved or even if they asserted their claims before consummation, relief under § 77(c)(7) might well have been granted. Unfortunately, that was not what happened, and the record does not reveal conduct by PCTC, over and above the alleged conspiracy itself, which permits the application of some form of equitable estoppel or other finding adequate to overcome the general policy that a § 77(f) discharge is final.

Even if the record supported the conclusion that the general policies of § 77 might be subordinated to the interests of Pinney and Litton, the interests of those protected by the policies of § 77 must be considered in the context of the Plan. Under the Plan, unsecured creditors receive a certificate of beneficial interest equal to 30% of their liquidated claim. The certificates of beneficial in-

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[11] On arguably more favorable facts Judge Ditter of this Court has held that the § 77(f) discharge barred former Reading employees from asserting asbestosis claims against the reorganized company. *Schweitzer v. Consolidated Rail Corporation*, 36 B.R. 469 (D.C.E.D.Pa. 1984).

terest have been redeemed from the proceeds of the Valuation Case litigation and unsecured claims now receive cash in lieu of a certificate of beneficial interest. Thirty-five percent of the original common stock to be issued on consummation of the Plan, 8,103,813 shares, was allocated under the Plan to general unsecured creditors.[12] The distribution of this pool of stock could not be completed at one time because a large number of unsecured claims had not been liquidated by October of 1978. The unliquidated claims were estimated and the pool was allocated on the basis one share per $96 of claim. PCC, in accordance with the Plan, was able to reduce the amount of claim per share to $55.30 once a substantial portion of the unliquidated claims were liquidated. Those who received the original distribution, whether or not they still retained their stock, received a supplemental equalizing distribution of stock. The Plan requires that when all or substantially all of the claims are liquidated, there will be another final distribution. PCC has estimated, based upon the facts available in mid-1983, that approximately 550,000 shares of the stock pool will be available for a final distribution.

Any distribution of the projected balance of the stock to petitioners would be at the direct expense of the unsecured claimants who would be denied a share of the final distribution. Use of authorized but unissued stock to satisfy any claim of petitioners would dilute the stock distributed under the Plan to both secured and unsecured creditors, and to those who received stock through the Chapter XI plan of the Penn Central Company.[13] Of

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[12] Included in the group receiving stock distributions from the pool of stock were certain other creditors of PCTC and the Secondary Debtors.

[13] Penn Central Company, the parent of PCTC, held all of PCTC's common stock. Ten percent of the Penn Central Corporation's common stock was allocated to the Penn Central Company, and that stock was distributed through the Penn Central Company's

course, persons who purchased or acquired PCC stock on the public market or in the ordinary course of business transactions would also be adversely affected by any dilution through the issuance of more stock. Although the certificate of beneficial interest aspect of the distribution to unsecured creditors raises a different issue, any significant cash distribution would be at the expense of the present owners and creditors of PCC. Moreover, because there was no disclosure of Pinney and Litton's claims, all present owners and creditors of PCC would be unfairly treated if their reliance on the bankruptcy laws were not fully recognized.

In sum, if it is appropriate to analyze the comparative situations of the petitioners versus those who now hold interests of any kind in PCC, the balance must be struck consistently with the policy of § 77. Any relief granted in favor of petitioners in this proceeding would have the possibility of ultimately prejudicing PCC's present owners and creditors and, therefore, equitable relief in favor of petitioners from the Order of Confirmation is not appropriate.

## IV. SUMMARY

Petitioners originally proceeded on the theory that PCC may be liable to them outside the Plan as a successor to PCTC. In the Memorandum accompanying Order No. 4206, I concluded that under no circumstances could PCC be liable outside the Plan. I adhere to that conclusion. Possible participation by petitioners under the Plan remained to be resolved.

No statutory or constitutional defects in the proof of claims program have been demonstrated and therefore the discharge under § 77(f) is effective to bar petitioners' claims. Equitable relief beyond that permitted by §77(c)(7) is not available as a matter of law, but even

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Chapter XI plan to thousands of stockholders of Penn Central Company.

assuming such relief is within the equitable power of this court, no showing has been made which justifies equitable relief. The net effect of these conclusions is to protect the participants under the Plan and the other present owners and creditors of PCC from a diminution or dilution of their interests.

Petitioners have labored vigorously to focus the dispute as one between injured parties and the alleged wrongdoer. The alleged wrongdoer, PCTC, no longer exists. The reorganization process has resulted in a reorganized company that is not the corporate successor in the ordinary sense. But for the reorganization process, creditors would have been satisfied on a first-come first-serve basis and petitioners would have suffered the same result as they do under the § 77 discharge of PCTC liabilities and the free and clear transfer of PCTC's assets to PCC. Instead of permitting the exaggerated economic losses which would have resulted from the sale of PCTC's assets, Congress substituted § 77. Section 77 does not, however, create any risks. Petitioners or any other creditors who did not know of their claims until well after PCTC was in extreme financial difficulty were subject to the risk that when they did learn of their claims, PCTC would be judgment-proof. Substitution of the reorganization process enhances the recovery of those who participate under the Plan. The scheme of § 77 is a constitutional and an appropriate way for Congress to seek to minimize the consequences of economic failure.

Petitioners' procedural due process arguments have already been considered and rejected in Section II. Petitioners seem to acknowledge that Congress has the power to discharge claims provided adequate notice is given. In any event, there is no arguable ground for asserting that the discharge of claims is beyond the bankruptcy power, at least when the discharged claims arise after the bankruptcy legislation which enacts the discharge provision. *U.S. v. Security Indus. Bank*, 459 U.S. 70, 103 S.Ct. 407,

74 L.Ed.2d 235 (1982); *Regional Reorganization Act Cases*, 419 U.S. 102, 95 S.Ct. 335, 42 L.Ed.2d 320 (1974); *Wright v. Vinton Branch of the Mountain Trust Bank*, 300 U.S. 440, 57 S.Ct. 556, 81 L.Ed. 736 (1937).

An order denying the petition will be entered. The parties will be given an opportunity to comment on the terms of an order concerning the termination of the Cleveland actions. Simple dismissal of those actions may or may not be appropriate.

## APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

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Bankruptcy No. 70-347

IN THE MATTER OF
PENN CENTRAL TRANSPORTATION COMPANY,
*Debtor*

In Proceedings for the Reorganization of a Railroad

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ORDER NO. 4247

AND NOW, this 20th day of June, 1984 upon consideration of the proposed form of order of petitioners Pinney Dock & Transport Company, Litton Industries, Inc., Litton Systems, Inc., Litton Great Lakes Corporation and Erie Marine, Inc., and a similar proposal of The Penn Central Corporation, submitted in response to the directions in the Court's Order No. 4243 with respect to enjoining certain claims which have been asserted by petitioners against The Penn Central Corporation in the two antitrust actions pending in the Northern District of Ohio, *Pinney Dock & Transport Co. v. Penn Central Corp. et al.* No. C80-1733 and *Litton Industries, Inc., et al. v. Penn Central Corp., et al.* No. C81-372, it is hereby ORDERED that:

1. With respect to the antitrust damage claims petitioners have attempted to assert, prosecute and pursue against The Penn Central Corporation in the two actions pending in the United States District

Court for the Northern District of Ohio (Nos. C80-1733 and C81-372) which are on account of or based upon an alleged right, claim or interest which petitioners may have had in, to or against the Debtor, Penn Central Transportation Company, and which were the subject of petitioners' "Petition for Leave to Pursue Antitrust Claims Against Penn Central In Another Forum" (hereinafter "pre-consummation claims"):

(a) Petitioners are permanently restrained and enjoined from prosecuting or pursuing, or attempting to prosecute or pursue any pre-consummation claims for damages or other relief against The Penn Central Corporation or any of its subsidiaries, affiliates, successors or assigns; and

(b) Petitioners are directed within thirty (30) days after entry of this Order to file a motion under Rule 41(a)(2), Fed. R. Civ. P., with the United States District Court for the Northern District of Ohio in each of their respective pending actions (Nos. C80-1733 and C81-372) for an order of that court dismissing with prejudice any and all pre-consummation claims which have been or are asserted against The Penn Central Corporation in the complaints in those actions.

2. Petitioners are directed within thirty (30) days of entry of this Order to file with the United States District Court for the Northern District of Ohio in each of the pending actions against The Penn Central Corporation certified copies of: (a) this Court's Memorandum and Order No. 4243 of May 21, 1984 denying their "Petition for Leave to Pursue Antitrust Claims against Penn Central In Another Forum"; and (b) this Order.

3. Within forty (40) days of entry of this Order, counsel for petitioners shall file with this Court a certificate of compliance with the requirements of Paragraphs 1(b) and 2 of this Order.

/s/ John P. Fullam
JOHN P. FULLAM
District Judge

## APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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Nos. 84-1355 and 84-1391

IN RE: PENN CENTRAL TRANSPORTATION COMPANY PINNEY DOCK & TRANSPORT COMPANY, LITTON INDUSTRIES, INC., LITTON SYSTEMS, INC., LITTON GREAT LAKES CORPORATION and ERIE MARINE, INC.,
*Appellants*

(D.C. Bky, No. 70-347)

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On Appeal from the United States District Court
for the Eastern District of Pennsylvania

Present: SEITZ and HIGGINBOTHAM, *Circuit Judges* and WEBER, *District Judge* *

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel March 20, 1985.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgments of the said District Court entered May 22, 1984, appealed at No. 84-1355 and June 22, 1984, appealed at No. 84-1391, be, and the same are hereby affirmed. Costs taxed against the appellants.

ATTEST:
/s/ Sally Mivos
Clerk

August 29, 1985

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* Honorable Gerald J. Weber, United States District Court for the Western District of Pennsylvania, sitting by designation.